

From Revolution to Constitution

Minority protection in Egypt's constitutions since the Arab Spring

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Abstract

This thesis argues that Egypt's constitutional minority protection has improved slightly since the Arab Spring as a result of military institutional interests and religious passions. Constitutional content depends upon forces and mechanisms present in the constitution-making process, as identified by Elster in 1995. Which forces and mechanisms are the most visible in the process depends upon the actors in the constitution-making process as well as the contextual situation. Both the 2011 Declaration and the 2014 Constitution of Egypt were created by the military, whereas the process towards the 2012 Constitution was led by an Islamist dominated parliament. Ideally, minority protection should be grounded in reason and a concept of human rights and democracy. The rights secured are mainly a result of religious passion in 2012 Constitution, and institutional interests in the two military constitutions. Although the 2014 Constitution yield the best constitutional minority protection seen in the history of the Arab Republic of Egypt, this comes at the expense of other democratic rights. The Copts would likely benefit the most from a democratic and stable regime. While the current military regime grants them certain rights, the trade off of democracy for minority rights seems like a bad bargain in the long run. The constitutional improvement of minority protection may remain just that: Constitutional and theoretical, but not applied to real life.

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I alone am responsible for the content of this thesis.

Abbreviations

ESDP – Egyptian Social Democratic Party

FJP – Freedom and Justice Party

HRW – Human Rights Watch

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

IDEA – International Institute for Democracy and Electoral Assistance

IFES – International Foundation for Electoral Systems

MB – The Muslim Brotherhood

SCAF – Supreme Council of the Armed Forces

SCC – Supreme Constitutional Court

UDHR – Universal Declaration of Human Rights

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1 Introduction

This thesis asks how the Arab Spring has affected minority protection of Egyptian Copts. By analysing and comparing the three constitutional documents in force since March 2011, it assesses how the Arab Spring and its aftermath has influenced formal religious minority protection and examines how mechanisms of the constitution-making process can explain the observed fluctuations.

1.1 Research question

The place of minorities in society and polity has been and still is a bedevilling problem in the Arab world. Nearly twenty years ago, Political Philosopher Will Kymlicka (1995) said that one of the greatest issues facing democracy today is conflict between minorities and majorities. This still is the case, and actualizes the debate surrounding minority protection and equal rights. In the Arab world, religious minorities are particularly at risk. Gabriel Ben-Dor and Ofra Bengio (1999:vii) point out that the subject of minorities has been taboo in many Arab states, as the mere idea of the existence of minorities clashes with the vision of pan-Arabism and the territorial state. It is necessary with closer attention to and acknowledgement of minority protection in the region, as the lack of recognition enhances the current inequality experienced by religious minorities.

In early 2011, the world witnessed an unforeseen series of events in the Arab world. It was not the first time people in the region protested, but previous revolts had not had such dramatic consequences as what soon came to be known as the Arab Spring. The authoritarian regimes had been known for their remarkable persistence, and both the sudden overthrow of authoritarian leaders as well as the range of the revolutionary wave came as a surprise to many around the world. The revolution was widely supported in the West, and Western media portrayed the uprisings as a turning point towards democratization and improved minority protection in the region.

Professor Dr. Vera van Hüllen argues that the Arab Spring opened a window of opportunity for democratic change, which increased the chances of renewed commitment and compliance with international human rights standards in the Arab world (Hüllen 2013:182). The Arab Spring has the potential of becoming a mile stone in Modern Arab History, as it highlighted the realistic possibility of change by throwing the political situation upside. The question remains whether the Arab countries have managed to seize this window to secure minority protection and build democratic institutions.

Egypt may be the critical test for the success of adopting Western conventional wisdom and structural reforms (Saleh 2004:75). The country has a special position in the Arab world, both in terms of relative population size and historical importance. It has one of the longest records in the region of attempts of modernisation, and it was the birthplace of Pan-Arabism. In order to understand processes in the region, it is important to get an understanding of the processes in Egypt. In prior research on minorities and marginalised groups in the Arab world, women have gained a lot of attention. Nazila Ghanea-Hercock (2004:728) calls for a more attentive study of religious minorities, as they rarely are given much attention alone without also including women in the analysis. The focus of this thesis will therefore be on religious minorities in Egypt and the Coptic community in particular, as elaborated in Chapter 1.2.1.

Egypt has experienced dramatic developments since the early months of 2011, as the country has entered into a new transition. Scott K. Brown (2000:1050) argues that Egypt can not eliminate all discrimination from non-state actors without first removing all discriminatory laws. A first step towards this is constitutional change. Three constitutions have been written since the Arab Spring, and have given Egypt a huge potential for constitutional change. First a preliminary Constitutional Declaration was announced in March 2011. Then Egypt's second constitution was approved in December 2012. Finally, a military coup in July 2013 set aside the 2012 Constitution

in favour of a military constitution, which was approved by a referendum in January 2014. Peace mediation and State building expert Kirsti Samuels (2006:4) argues that the constitution-making process have an important impact on the country's transition to democracy and the resulting state. The processes leading towards the three constitutions are therefore used in the explanation of the constitutional content.

Minority protection remains relevant through Egypt's transitional process. At the end of the 1990s, Ben-Dor (1999:16) warned that Islamic radicalism would bring Egypt closer to becoming an Islamic state. He argued that the transition would threaten non-Muslims in Egypt no matter how it manifested itself; Islamic legislation would inevitably be introduced at the expense of the modern nation state and eventually minority protection. The Islamist parties have been one of the major forces in Egypt's latest transition, which actualized Ben-Dor's warnings. After the ousting of the Islamist-led parliament, critics of Egypt's new military regime now fear an end to the anticipated democratisation. In connection with this latest development, religious conflict between Muslims and the Coptic minority seems to have escalated. This provides the backdrop for this study of Egypt's constitutional protection of the Copts.

The Egyptian people displayed an apparent unity against the then incumbent President Hosni Mubarak in the revolution in 2011. Copts took part in the revolution, but during the first weeks, Western media reported that Copts said they were rethinking the opposition to Mubarak's government. Although Mubarak's rule was discriminatory, it was predictable (Champion 2011). The revolution brought about uncertainty as well as fears of an anti-Christian backlash if Islamist groups were to gain power. Church worker Sameh Joseph in Alexandria expressed the anxieties of many Copts when he said: *"He's the best of the worst. Whoever comes after him might want to destroy us"* (Sanders 2011). Whereas many Egyptians rejoiced after the overthrow of Mubarak, Copts like Sameh Joseph were too worried about the future to join the celebrations. This thesis aims to give some answers to whether this fear was justified, and draws some preliminary conclusions with regards to the prospects of

Egypt's Coptic population.

1.2 Terms and concepts

With a focus on constitutional protection of non-Muslim religious minorities in Egypt, it is necessary to establish what is meant by a religious minority, minority rights and minority protection.

1.2.1 Religious minorities

According to the Oxford Dictionary (n.d.), a minority is «a small group of people within a community or country, differing from the main population in race, religion, language, or political persuasion». The definition does not specify how many a «small group» is, and others argue that a minority is not necessarily a numerical term, but a definition in «terms of their political standing within the state, that is, their lack of political power» (Bengio and Ben-Dor 1999:vii). This vagueness characterizes the minority discourse, as no internationally enacted definition of the term exist (Fortman 2011:276). Although the definitions vary, they share some common traits. First, a minority is commonly defined as *inferior* to the rest of the population of a given space, either in mere numbers or powers. Secondly, a minority is in some way *differing* from others. These two criteria emphasize that a minority does not exist in its own right, but rather in relationship to a majority or a collection of other minorities (Ben-Dor 1999:1). A minority is in this way a result of social and political constructions in relation to the rest of society (Fortman 2011:276-279). This does not mean that they are less real, as «[i]deas in the minds of groups of people are political facts of life and are as strong as any objective factors» (Ben-Dor 1999:7).

A religious minority diverges from the majority in terms of religious beliefs. Religion constitutes one of the most obvious points of division in Muslim countries today, and conflict between a Muslim majority and Christian minorities has been a recurring problem. About 90 % of the population in Egypt adheres to Islam, and the

religion has an important presence in society and in the minds of the people (Ben-Dor 1999:19). Professor in Middle Eastern History Dick Douwes (2009:33) explains that the establishment of a community as a minority is «based on the perception that this particular group does not fully share the values of a given society». In Egypt, anyone not adhering to Islam should be considered a religious minority. Although it is said that «The house of Islam is one», the distinction between Sunni and Shi'a Muslims has been so central in the political history of the Middle East that the presence of the Shi'a minority can additionally not be ignored (Ben-Dor 1999:17). As the non-Muslim groups remain the most exposed religious minorities in Egypt, the non-Muslim minorities will be the primary object of this thesis, with a main focus on the Coptic Christians. Egypt additionally has small minorities of approximately 2000 Baha'i and 200 Jews. The Jewish community shares many of the same anxieties as the Copts, but due to Egypt's tense relationship with Israel, a number of separate problems add to the Jewish situation and will not be included here. Islamic law and jurisprudence traditionally separates between Muslims, divine religions and other religions in terms of citizen rights. Chapter 3.1 will elaborate more on this so-called Dhimmi system. The Baha'i is not considered '*ahl al-kitaab*' or «people of the Book» by Islam, which place them in a unique position. While acknowledging the problems of all of Egypt's religious minorities, the thesis does not have the room for an elaboration on all of Egypt's minorities, and more research is needed.

The concept of a minority is a fluid one, and there is no reliable legal method for deciding group membership. The most consistent method is self-identification, but this is subjective and not without problems (Fortman 2011:285). A minority group will only identify itself as such if it has something to win from it, in terms of security and protection (Fortman 2011:277). Chapter 3.2 explains how the Coptic community refused to include minority rights in the 1923 Constitution, as they considered themselves as a part of the Egyptian people, and not a minority (MRG 1996:12). This does not mean that they ceased to exist. Independent from whether a person views herself as a Copt, she may still face the same discrimination as everyone else

considered as a part of the Coptic minority. As this thesis examines the minority protection in Egypt's constitutions, it makes more sense to rely upon the legal definitions. The thesis refers to minority groups as those the Egyptian constitutions identify as such.

1.2.2 Minority rights and minority protection

The notion of Minority Rights is a part of the Human Rights doctrine, and the idea dates back to the Enlightenment's idea of natural rights. Human Rights are commonly understood as fundamental rights held by every human being, and are considered universal. The central idea of international Human Rights is according to Charles Beitz (2009:13) that states are responsible for treating its inhabitants in a way that meets certain universal criteria. This is today codified in international treaties, and Egypt, along with most of the countries of the world, is a signatory to the International Bill of Human Rights. The Bill consist of the Universal Declaration of Human Rights (UDHR) from 1948, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) from 1966 (Monshipouri 1998:70). In the UDHR the individual human being was, for the first time, universally deemed to be entitled to fundamental human rights and freedoms (Åkermark 1997:40). The introductory articles of the Declaration sets the tone for the entire text, when it states that «all human beings are born free and equal», and granted the same rights without distinction on amongst other religion (Glendon 2001).

Many Muslims consider Sharia as the source of Human Rights, and Saudi-Arabia objected initially to the UDHR on religious grounds (An-Na'im 1987:7). According to Professor in International Relations Mahmood Monshipouri (1998:19) Islam insists that rights are owned by God, and not by humans. Individuals can only enjoy rights as long as their obligations towards God are met. Moral obligations towards other persons further take precedence over individual human rights. This poses a problem for the safeguarding of the rights of non-Muslim, as members of other

religions do not obey all obligations towards God as defined by Islam. However, this does not mean that Islam is incompatible with the notion of Minority Rights, and improvement is also possible within the Muslim religious framework (e.g. Ghanea-Hercock 2004). Nagwa Megahed and Stephen Lack (2011:403) argue that Muslim-majority societies combine the values and principles of Islam with indigenous habits of both the Muslim and non-Muslim population. This is also the case in Egypt, and although Sharia has been considered the main source of legislation since 1980, there are also a number of clauses not based in Sharia law (Wahab 2006).

The minority problem is grounded in the abuse of dominant positions towards inferior groups of the society. The concept of minority protection and minority rights stems from the idea that minority groups need special protection to gain equality with the majority of society: Human rights can be claimed by any individual, but as minorities are discriminated against everywhere, they need extra protection (Beitz 2009). It is common to distinguish between group rights and individual rights, and «minority rights» is used both regarding individual rights applied to members of minority groups as well as collective rights held by the groups. International treaties codifying Minority Rights includes the ICCPR, the OSCE Copenhagen Document of 1990, two Council of Europe treaties and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Athanasia Spiliopoulou Åkermark (1997:53) argues that Minority Protection should be distinguished from Minority Rights, as it includes «the whole network of (legal) methods and mechanisms supporting minority cultures», and not merely legally recognised interests. The two concepts are however intertwined, but there are also interests that are not legally protected, as well as protection not based in rights. A first step towards protection is the recognition of rights in law, but also the enforcement of these rights may be included in the term, protection. The term also includes instruments that are not legally binding (Åkermark 1997:52-54).

As Egyptians gathered at Tahrir square, the western world rejoiced for the

possibility that democracy finally would leave its mark on the Arab World. However, democracy is not a guarantee for minority protection. Formal democracy relates to the decision making process, where elected representatives govern in accordance with the will of the people – or more precisely: the will of the majority of the people. This leaves the well being of minorities at the good will of the majority. Egypt's elections in 2012 are an example of formal democracy, and the Coptic population worried that the Islamist majority would abuse its power and remove fundamental rights. A contemporary understanding of democracy incorporates an idea that protection of minority rights «in the face of the tyranny of the majority» is fundamental. This is often called substantial democracy, and is derived from the idea that states exist to serve the people living in them, and not visa versa. In this perspective, the very essence of democracy depends on the realization of fundamental rights for every human being. It is based on recognition of human worth, dignity, liberty and equality for all humans. Conflicts between protection of rights and majority rule are a natural expression of two vital democratic elements (Association for Civil Rights in Israel 2010:5-6). The ideas of democracy and minority protection reflect upon each other, and will both be important for Egypt's further transition.

1.3 Methods

Every research design comes with positive and negative sides, and it is important to choose the design that generates the best answer to the research question. With this in mind, this thesis provides a case study of the Coptic situation in Egypt with document study as the main research method. The main reference points are Egypt's three most recent constitutions and the adjoining constitution-making processes, and the main sources have been the constitutional texts as well as relating documents, scholarly literature, human rights reports and news paper articles.

1.3.1 Case Study

Political Science professor John Gerring (2007:20) defines a case study as an

«intensive study of a single case where the purpose of that study is – at least in part – to shed light on a larger set of cases». The study of Egypt's constitutional minority protection will yield a deep understanding of the Copts' situation in Egypt. The study is not conducted in the belief that Egypt is a perfect representative of all countries, but generates knowledge that can be transferred to resembling cases. Egypt as a case study may be a litmus test for the possibilities in other Arab countries going through similar changes. It gives causal insight into mechanisms present in the constitution-making process rather than direct effects, and has a strong causal strength (Gerring 2007:37). The investigated causal mechanisms are addressed in Chapter 2.3. The comparison of the three constitutions adds an element of multi-case study within the selected case, which enhances the external validity within the context of Egyptian law (Gerring 2007:37-38). This enables the thesis to examine the fluctuations over time in addition to analyse the separate constitutions, and increases the range of what can be learned from the findings.

Case studies are often criticised for low external validity. In return the internal validity will be higher than in a cross-case study. George and Bennett (2005:25) also criticize the obscurity of the knowledge provided by a case study, and state that it only provides tentative conclusions about the impact of one variable on another in one particular case. As this thesis aims at exploring the impact of Egypt's transitional process on Egypt's constitutional minority protection, this is not a major concern of this thesis. The research question does not concern a quantitative measure of the impact, and such tentative conclusions are of more value. Case studies are stronger at identifying scope conditions for a theory and evaluate the necessity and sufficiency of certain variables for a specific phenomenon to occur. Yet another quality of the method is that it provides a possibility to use various techniques to gather and analyse evidence rather than relying on one specific method (Gerring 2007:33). The Document Study has been the main tool in this thesis.

1.3.2 Document Study

Document analysis is «an integrated and conceptually informed method procedure, and technique for locating, identifying, retrieving and analysing documents for their relevance, significance and meaning» (Altheide 1996:2). Egypt's three constitutions will constitute the main source of the analysis. Although relying on judicial material, this is not a thesis in the field of law. There is a long-standing association between law and social sciences, and particularly in the topic of «rights» it can prove helpful with a social science perspective, as this is closely linked to social phenomena (Tomkins & Ourslandt 1991). Egypt's constitutions are results of social changes, and are reviewed with their impact on society and link to political realities in mind. Niels Petersen (2013) argues in favour of constitutional interpretations based in the social sciences, as the legal reasoning in constitutional law often is based on empirical assumptions. Using social sciences on judicial texts can yield a better understanding of causal mechanisms in the process, although the textual interpretation may not be as accurate (Petersen 2013). This accuracy is made further problematic due to the language barrier posed by Arabic, and the analysis will rely on English translations. Chapter 1.3.3 address some of the challenges encountered when relying on translations.

The thesis also builds on relevant literature from scholars on the topics of minority protection and constitutional analysis. The transitional process in Egypt has spurred interest among both scholars and news agencies, which has resulted in an additional body of literature. Altheide (1996) argues that the public debate can provide important information, and the thesis will draw upon secondary sources such as reports from various human rights organizations and news agencies, always keeping the insecurity of these sources in mind. Tarrow (2010:250-251) argues for methodological plurality in order to improve a study. To preserve reliability, triangulation has been used to make sure not to rely exclusively on one source.

A central aspect of the informed document analysis is exactly to be so familiar with the research topic that no important documents will be missed (Altheide

1996:50). Egypt's constitutional process has received a lot of media attention, and the extent of the material has at times been overwhelming, and the main challenge has been to narrow the search. The sampling strategy started out with a wide search based on initial assumptions in relation to the research question. During the research process, the increased understanding of the topic has allowed for «progressive theoretical sampling», and relevant articles has been obtained while omitting irrelevant articles (Altheide 1996:33-34).

Whereas the constitutional content has been widely debated, it has proved harder to obtain the necessary information regarding closed proceedings in the constitution-making processes. As a consequence the analysis at times relies on scarce information in combination with informed assumptions. Also with regard to the most recent constitution, the analysis encountered a shortage of reliable sources as the Constitution is merely a few months old. The short time frame implies that the Constitution has mainly been addressed in news papers and blogs as well as by some human rights agencies. Although amongst others Freedom House has published reviews of the current human rights situation in Egypt, neither the UN's Universal Periodic Review nor Polity IV Country reports have been published for last year, and the sources are limited. This poses a further threat to reliability and validity. There may also be an array of texts and topic only available in Arab language. This is further addressed in Chapter 1.3.3.

1.3.3 Methodological challenges

A main methodological issue is represented by the language barrier. Only a minor part of what is written in the Arab world is translated to English. Since Egypt was heavily influenced by Britain during the colonial period, the number of sources available in English is fortunately large compared to other Arab states. A majority of the available English literature will be by western scholars, who tend to address topics from a Western view. This comes with a danger of cultural biases, and the reliance on English

texts is likely to skew the thesis towards a Western interpretation of the texts. For many in the Western world a word like «Islamist» comes with connotations that will be read into the context. Much of the anxiety surrounding the process towards the 2012 Constitution came from the mere fact that it was led by Islamists, and secularists and the Western world alongside with Copts feared what it would bring about.

Translations to English further bring a risk of mistakes in the translation. As for the constitutions, the thesis has relied on the official translations for the two first constitutions. As for the 2014 Constitution, the International IDEA Institute for Democracy and Electoral Assistance provided a translation. These are likely to be quite accurate, but as some Arabic terms do not exist in the English language, some meanings may get lost in the process. When relying upon news paper articles, any allegations of constitutional content have been cross-checked with the constitutional translations in order to ensure accuracy. There appear to be particularly many variations in the translations regarding the principles of Sharia in Article 219 of the 2012 Constitution. The analysis relies on the official translation in such cases, although some clauses could be understood differently.

1.4 Outline of the Thesis

The introductory Chapter started out by introducing the topic of study and research question, as well as explaining the relevant concepts and introduced the methodology. In Chapter 2 the theoretical background for the thesis will be presented. After a literature review, it will detail the theoretical framework provided by Jon Elster. To gain a full understanding of the treatment of Egypt's minorities, Chapter 3 gives a brief account of the Coptic history in Egypt prior to the Arab Spring.

The main analysis is conducted in Chapters 4 – 6. These chapters will focus on the period from the overthrow of Mubarak until the adoption of Egypt's latest constitution in January 2014. As a state's government is the key institution for

guaranteeing all members of society equal rights, the focus will be on the effort to protect Egypt's minorities as shown in the constitutions one at a time. Chapter 4 address the 2011 Constitutional Declaration, Chapter 5 the 2012 Constitution, and Chapter 6 the 2014 Constitution. Each chapter will elaborate on the content of the respective constitution in relation to minority protection, then go on to the constitution-making process itself, before it concludes by applying the framework provided by Jon Elster to explain the close connection between constitutional process and content. Chapter 7 sums up the paper while gathering loose ends and draws some conclusions regarding the fluctuations of Egypt's minority protection.

2 Analytical framework

The topic of this thesis is minority protection in Egypt. It seeks to examine Egypt's constitutional evolution of minority protection since the Arab Spring and explain the reasons for the observed fluctuations. In order to explain the observed fluctuations, it relies on the theoretical framework provided by Jon Elster, and argues that the forces and mechanisms of the constitution-making process are vital to the resulting minority protection seen in the constitution.

2.1 An interdisciplinary approach

Peace and Conflict Studies is an interdisciplinary field. This opens for the possibility to utilize theories from various fields of study as well as combinations of these. However, this also poses certain challenges when it comes to selecting a fitting theoretical framework. Theoretical perspectives from law, economics, sociology, anthropology, history and political science can be used to analyse Egypt's three most recent constitutions and the road between them. An interdisciplinary approach is likely to yield the most thorough understanding of the topic at hand.

This thesis aims to examine the constitution-making process in Egypt from March 2011 to January 2014. It also seeks to review the outcome of the process with regards to how protection of minorities is reflected in the constitutional content. As the legal framework is a first step towards improved minority protection, this is elementary to the future protection of Egypt's minorities. The analysis relies on the theoretical framework presented in Jon Elster's (1995) essay about «Forces and Mechanisms in the Constitution-Making Process». Elster suggests that the desires and beliefs in the constitution-making process are vital for the constitutional content. These forces come together through aggregation, where both transformation and misrepresentation has its impact on the final constitutional text. Elster's framework is applied with the intention to explain the causal mechanisms behind the minority

protection of Egypt's three most recent constitutions. As Elster's theory is not optimal, theoretical works by scholars of international relations and constitution-making have also been taken into account.

The fact that most scholars theorize within the parameters of one particular discipline has made it difficult to find the right analytical framework. The ideal theory should explain the link between the constitution-making process and the constitutional content, which political realities they reflect, as well as the implications for minority protection in Egypt. It has proven hard to find *one* theory that fits these criteria. Many scholars have explored different aspects of both constitutions and constitution-making process without providing a framework that can answer the research question of this thesis.

There is a plethora of books and articles on distinctive constitution-making episodes (e.g. Bonime-Blanc 1987). Game theory has been used to explain why a certain constitution is adopted over another, but does not explain why specific constitutional provisions are included (e.g. Heckathorn & Maser 1987). The legislative process has been analysed by scholars of law, but without paying attention to political realities (e.g. Lang 2013). Studies looking at the constitution-making process often leave out the constitutional content (e.g. Samuels 2006; Widner 2005), or merely looks at constitution-making as an aspect of democratization or economic prosperity (e.g. Sunstein 1991; Ghai & Galli 2006). Scholars concerned with constitutional content focus on the interpretation and perception of a constitution, moral or legal implications, without including the constitution-making process (e.g. Ghai 2005; Macey 1986). Except from studies of particular constitution-making episodes (e.g. Rakove 1987), the procedural and contextual aspects of constitution-making are rarely combined in an overarching study of the constitution-making process. At the tip of the century social scientist Jon Elster wrote:

Surprisingly, there is no body of literature that deals with the constitution-

making process in a positive, explanatory perspective. There are, to be sure, a number of studies [...] of particular constitution-making episodes. Furthermore, there is a large comparative and theoretical literature on the ordinary legislative process, as well as a substantial body of writings on comparative constitutional law. Much has also been written on the consequences of constitutional design [...]. But there is not, to my knowledge, a single book or even article that considers the process of constitution-making, in its full generality, as a distinctive object of positive analysis (Elster 1995:364).

Almost twenty years later, there seems to still be a knowledge gap in the literature on constitutions. For the purpose of this thesis, the theoretical framework provided by Elster's (1995) 19 year old essay «Forces and Mechanisms in the Constitution-Making Process» remains the best framework. Admittedly, Elster is most concerned with the constitution-making process, but the implications of this process on the constitutional content are also an integral part of his analysis in a cause-effect perspective. His theory can accordingly contribute to explain the relationship of process and content to explain the process and outcome of Egypt's three most recent constitutions, and their reflection of political realities. The theoretical framework will be the starting point for this analysis.

2.2 Two traditions of constitutional analysis

The field of constitutional analysis can crudely be separated into two main schools of thought, referred to here as the *classical school* and *political realism*. The classical school builds upon a legal tradition and holds a constitution to be an overarching legal platform by which to govern a country. According to this tradition, the constitution-making process rises above everyday politics. The constitution is seen as a normative framework for how a country *ought* to be. This ideal does not reflect the realities of most constitution-making processes. In contrast, political realism emphasizes the context of the constitution-making process, and emphasizes the inseparability of the constitution and the political balance of power. The constitution is this way seen as a short-term political agreement rather than a long-lasting social contract (e.g. Farouk 2013:2-3; Lang 2013).

Elster's theory can be placed in between these two schools of constitutional thought, and the transitional process in Egypt has been influenced by both ideological aspirations and political realities. Yasmine Farouk (2013:2) places the ideals of the revolutionary forces of the Arab Spring in the classical tradition. Egypt's revolutionary idealists wanted the new constitution to serve as a compass, and believed it was possible to separate the constitution-making process from the ongoing struggle for political power. According to her the parties in control of the constitution-making process in 2011 and 2012 went too far in adopting the second school's ideal. They did not distance the constitution-making process from the political balance of power, and this is evident in the constitutional text. Although capturing much of the essence, Egypt's constitution-making process has not been quite so black and white. Elster's theoretical framework enables the analysis to corroborate how both grand ideals as well as political realities influenced Egypt's constitutions. The constitutions reflect short-term political alliances, but Egypt's transitional process has also been governed by democratic ideals as well as religious passions. Egypt's three constitutions reflect the realities of real-politics, but also include some aspirations for which direction the country should take. In order to give the analysis as much explanatory power as possible, Elster's middle way incorporating elements of both traditions will yield the most correct analysis.

Elster's (1995) essay «Forces and Mechanisms in the Constitution-Making Process» creates a framework for analysing the process leading up to the final constitutional drafts. He points out that constitutions are rarely written under conditions ideal for constitution-making. A country with the appropriate time and resources does not usually see the need for a new constitution. Instead, constitutions tend to be written in the wake of a crisis, shortly after events such as revolution, war or liberation (Elster 1995:368-371). This is also the case in Egypt. Constitutions may ideally be written with the intent of creating a road map for the country to guide by in times of crises, but the fact is that a constitution is most often written *at times of*

crises: Egypt's new constitutions may include provisions for how Egyptians want their country to be governed in the years to come, but they will also be influenced by contextual real-political factors. This does not mean that there is no room left for ideological provisions in the text as well. Egypt's constitution and minority protection will be influenced by the current political context, the crisis and the power balance, as well as the ideals of the revolutionaries.

2.3 Elster's key concepts

In «Forces and Mechanisms in the Constitution-Making Process» Elster (1995) identifies a number of key concepts influencing the inner dynamics of the constitution-making process. The analysis takes both the *framers* writing the constitutions as well as the *framed* actors who will be regulated by the constitution into account. Elster terms the main forces and mechanisms that influences the process of constitution-making *constraints; desires and beliefs; aggregation, transformation and misrepresentation*. Figure 1 gives a schematic representation of the influencing forces and mechanisms identified by Elster, and how they relate to one another. This chapter explores each of the concepts in general terms before they are applied to the three Egyptian constitutions in the Chapters 4-6.

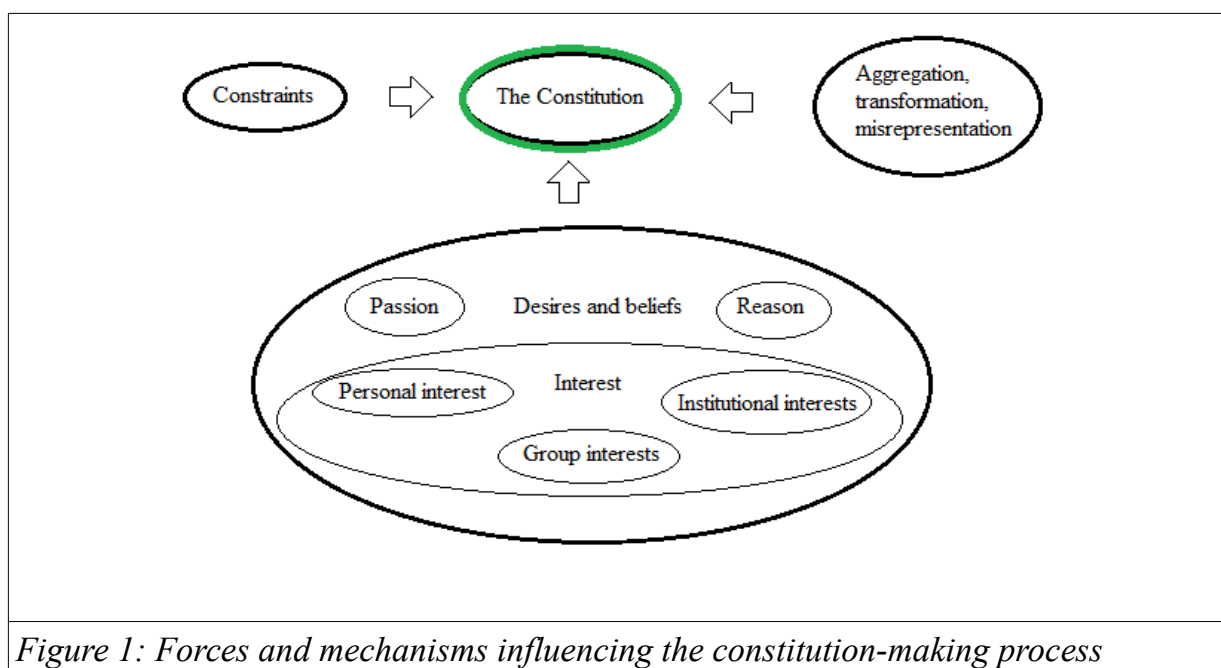


Figure 1: Forces and mechanisms influencing the constitution-making process

According to Elster, every constitution-making process is subject to different **constraints**. A constitutional assembly usually has one or two external creators, imposing *upstream constraints* on the assembly prior to the process, for instance by giving initial instructions regarding procedures and/or contents. The preferences of powerful actors initiating the constitution-making process will in this way influence the final document. Since the draft constitution also needs ratification, knowledge of the ratifying body's preferences will influence the process through *downstream constraints*. When this ratification takes place as a referendum, the framers have to take the ideals of the people into consideration. The upstream/downstream-division is however somewhat arbitrary, as downstream constraints often are imposed by the upstream authority as well. The constituent assembly may refuse to follow given instructions – and a constraint that can be ignored is in fact no constraint (Elster 1995:373-375). A key point is nevertheless that a constitution-making process does not take place in a vacuum separated from political realities on the outside. Apart from the framers themselves, both creators and the will of the people influence the process through these constraints.

Elster (1995:376) argues that the framers of a constitution will be guided by their own **desires**, as well as **beliefs** about the motivations of those framed. Although the framers may desire power, they also have to take their beliefs of the motivations of the framed into account. Elster separates these desires and beliefs into **interests**, **passions** and **reasons**. These motivations influence the constitution-making process in various ways. Whereas *individual interest* usually plays a marginal role, *group interest* has strong explanatory power for determining electoral laws, as exemplified by political parties insisting on voting systems that will strengthen their position. Group interest can be hard to identify, as the groups in public often argue for their views in terms of impartial values, such as equality and democracy. Behind closed doors, however, discussions tend to become more interest-based, and this has been evident in Egypt's transition. *Institutional interest* is a stronger determinant of the machinery of

government: Different bodies participating in the process will often attempt to write an important role for themselves into the constitution (Elster 1995:376-386). Many differences between Egypt's three constitutions can be ascribed to the actors involved in the constitution-making processes, and the analysis shows that institutional interests influenced the process towards the 2011 and 2014 Constitution the most.

Chapter 2.2 addressed the two schools of constitutional thought. According to the ideals of the classical school, a key role of a constitution is to prevent the framed from acting on impulses – termed *sudden passions* in Elster's framework. Along similar lines, it is argued that a constitution should protect minority groups from the *permanent passion* of majority oppression (Elster 1995:382f). One of the main concerns of this analysis is whether Egypt's constitutions have been able to do this. The analysis shows that the permanent passions of the Islamist authorities dominated the constitution-making process in 2012.

Passion can be hard to overcome, but sometimes *reason* may become the dominant force behind our choices. Elster (1995:377) describes *reason* as an impartial concern for the public good or individual rights. Examples of this covers arguments genuinely relaying on a concept of intrinsic fairness; for instance when taking future generations or minorities into account (1995:384-386). A constitution governed by *reason* is likely to provide the best prospects for constitutional protection of Egypt's Coptic minority. Whereas other *desires* also may result in improvements of the constitutional minority protection, the incorporation of rights on grounds of intrinsic fairness is likely to yield a more lasting result, with prospects of further improvements. Although the protection of minorities partially can be understood as a group interest from the side of the minority groups, the main arguments for protection of minorities are grounded in the impartial concerns of reason.

The constitutional text is in the end the result of a collective decision, achieved through an *aggregation* of the present motivations and assumptions. Before this, the

delegates also have to decide on the procedure of the process itself. Discussions conducted behind closed doors allow the framers to change their minds without loosing face and tend to improve the quality of the constitution-making process. Accordingly, a *transformation* of initial preferences may occur as new information is revealed, or delegates are persuaded by normative arguments (Elster 1995:386-388). Egypt's three constitution-making processes will be investigated separately, but also seen as a part of one continuous process. Changes seen between the first and last constitution can be explained as results of such transformations of preferences, as both were initiated by the military, and their differences cannot merely be ascribed to various actors. Finally, delegates do not always express their true preferences. Threats, vote-trading or sheer vanity may lead to such *misrepresentations* (Elster 1995:388-393).

Elster's theoretical framework is the mainstay of this analysis. The Chapters 4-6 apply his concepts to the three constitutions at hand in order to explain the effect of these forces and mechanisms on Egypt's minority protection. Each of the three chapters starts by describing the situation of the Coptic minority in the corresponding constitution. This aspect will be addressed in adherence with the understanding of minority protection in international treaties addressed in Chapter 1.2.2. Thereafter, each chapter describes the respective constitution-making process. This part relies mainly upon reports from news agencies and human rights organizations. Finally, Elster's framework is applied with the intention to show how the constitution-making process has influenced the minority protection. In order to understand which political realities are reflected in the constitutional text, the analysis will highlight the presence of the various mechanisms. It identifies constraints posed by external creators and ratifying bodies, as well as the desires and beliefs held by the framers, and investigate how this has effected Egypt's minority protection. The final constitutions are seen as a result of an aggregation process involving the motivations and assumptions identified. Before concluding, I will try to establish whether there are signs of transformation or misrepresentation in the drafts. However, as much information regarding the

discussions of the constitutional assemblies remains unavailable, the concepts of constraints, desires and beliefs will remain the most important factors to the analysis of Egypt's constitutional minority protection.

3 Background: 2000 years of minority protection in Egypt

A. Phillips states that the «fate of the Copts is inseparable from that of Egypt. A stable, prosperous and democratic Egypt holds the greatest promise for the Copts» (Minority Rights Group International 1996:5). Historical evidence supports this statement. The treatment of Egypt's Christian population tends to worsen when the country is in times of distress. In order to understand the current situation of minority protection in Egypt, it is necessary with a review of the relevant historic background. Egypt's Copts constitute about 10%¹ of the population, and is the largest of Egypt's non-Muslim religious minorities. Although there has never been a sectarian civil war between Christians and Muslims in Egypt, history reveals that the government rarely has done enough to protect its Coptic minority (Makari 2007:3).

3.1 *Aigyptios, Egypt and Copts*

When Islam was brought to Egypt in the 7th century, Christian Copts had already been living there for 600 years. The words «Egypt» and «Copt» are both derived from the Greek word «aigyptios». The word did not initially refer to a religion, but rather to the national community (Gregorius 1982:57f). When the first Arabs came to Egypt, it was called «the land of the Copts». As all Egyptians at the time were known as Copts, they differentiated between Egyptian and Arab instead of between Christian and Muslim (Minority Rights Group International 1996:6). Today the term is used in Egypt to refer to all Christians with Egyptian origin (Nispen tot Sevenaer 1997:23).

The Coptic Church in Egypt was founded in the middle of the first century AD by the Apostle St. Mark, who himself died the martyr death. Egypt was at the time under Roman rule, and the Romans worked hard to impose the rapidly spreading

¹ These numbers are somewhat uncertain, although they stabilized some time in the middle ages (Nispen tot Sevenaer 1997:23). Official estimates say 6-8%, whereas some Copts refers to above 20%, and accuses the government of downplaying the actual size of the minority in order not to seem discriminatory (e.g. Atiya 1979, Makari 2007:38f). Most commonly it is referred to an estimate of 10%.

Christian culture. As a result the Coptic minority was targeted in the following centuries (Minority Rights Group International 1996:7). The prosecutions peaked in the early 4th century, when 800 000 Christians were put to the sword in the course of ten years (Gregorius 1982:58f). The period came to be known as the «Age of Martyrs». Still, Christianity continued to spread. The Romans realized that their oppression merely resulted in resistance, and Christianity was announced state religion in 312 AD to appease the Egyptian population. In 451 AD, the Coptic Church rejected the Council of Chalcedon and with it the state religion. The Copts argued that they believed in the «one nature of Christ», not two. The debate split the Christians in two hostile camps, and distanced the Copts from the Catholic Church and the Byzantine rulers. It remains debated whether the break was due to Egyptian nationalism or genuine theological factors (Minority Rights Group International 1996:6f). The Byzantine Emperors demanded unity within the church and decided to impose it with force, and a new wave of persecution of Copts followed (Atiya 1979).

Many Copts welcomed the Arab invasion of Egypt in 640 AD, due to religious oppression. The Arab population grew quickly over the next centuries, and eventually *Sharia* came to govern the relationship between Muslims and non-Muslims. Islamic law traditionally divides between Muslims and Dhimmis. The dhimma include all non-Muslims belonging to the Abrahamic religions – the Christians, Jews and Sabians. Dhimmis are often referred to as «protected people» but also as «second class citizens», depending on the perspective (Brown 2000:1054-1056). The system is grounded in a concept of collective rights and group based rights. It may have worked well historically, but faced with contemporary ideas of minority rights based on the idea of individual rights and equality between members of different groups it seems obsolete (Nispen tot Sevenaer 1997:24). Dhimmis were amongst other not trusted for military service, and had instead to pay *jizyah* taxes if they would not convert to Islam. The change of rule benefited the Copts in some ways, but simultaneously a number of discriminatory laws were introduced (Brown 2000:1054-1056).

Both migration from the Arab peninsula and the introduction of Arabic language and religion contributed to the rapid Arabization of the area. The spread of Islam was partly a result of voluntary conversion, but unequal treatment of the religious groups also played a part, and Christians converted to gain equality and avoid the heavy taxation (Minority Rights Group International 1996:8). Some time during the 9th century the previous Christian majority became a minority to the growing Muslim population (Nispen tot Sevenaer 1997:23).

Discrimination has continued throughout the centuries: although some dynasties protected the Coptic minority, they have more often been treated as second class citizens. In times of economic recession and political despotism, the discrimination has increased. Under the reign of the Tulunids, Ikshids and Fatimids between the 9th and the 12th century, the Copts were said to be treated with respect and experienced barely any discrimination. This tolerance was destroyed when crusader wars over the following century involuntarily stirred up jihad spirit in the Arab population. Once again, they directed their anger towards the Coptic minority (Minority Rights Group International 1996:6-10).

3.2 From Ottoman to British rule

In the 16th century, Egypt became a part of the Ottoman Empire. The Copts were left with close to no influence over higher administration. After the disintegration of the Empire, Egypt went through a period of political distress. The upper and middle class sought more stable rule, and Muhammad Ali started the process towards a society organized around class structure. Ali was no Egyptian nationalist, but is often given the credit for building the «modern Egypt» due to his military, social and cultural reforms. He lent ear to the Copts, and used local expertise from both Copts and Muslims in his reforms. However, he ruled with absolute power, and his High Council also excluded Copts (Minority Rights Group International 1996:10f).

The concept of equality between Muslims and non-Muslims gained support under Muhammad Ali's successors in the second half of the 19th century. The jizyah taxes were abolished alongside with acceptance of Copts in the army (Nispen tot Sevenaer 1997:24). The infamous «Hamayouni Decree» stems from this period. Up until 2005, the decree caused problems for Christians due to overly strict restrictions on building and restoration of churches. Contrary to current beliefs, the decree was originally an advanced law to remove ethnic and religious discrimination, and guaranteed Christians the right to build houses of worship. In 1934 a ministerial regulation altered it as to demand a presidential permission in order to be allowed to build a church or even repair a church toilet (Minority Rights Group International 1996:10-11; Makari 2007:49). The example shows how even laws originally made to benefit Christians later has been turned against them. The protection of the Coptic minority is a constant ebb and flow according to who is making the laws.

In 1882 Egypt became a British colony, and experienced concurrently a rise of national consciousness. To avoid a revolution, the Brits instead created internal sectarian strife by putting Muslims and Copts up against each other. What saved the country from a massacre was the emerging ideological concept of «one people and one nation», which allowed for diverging religious beliefs within the country. Coptic and Muslim intellectuals adopted concepts of equality and nationalism deeply rooted in a common Egyptian culture (Minority Rights Group International 1996:12). Egypt's first Christian prime minister was elected in 1908. When he later was assassinated, the common resistance to the British occupation allowed the resulting tensions to be forgotten. Coptic participation in political life increased, and the 1919-revolution remains a symbol of «national unity» in Egypt up till today (Nispen tot Sevenaer 1997:25). In 1923 a new constitution was written. Even the Copts opposed to include the rights of religious minorities in the constitution, as they refused to see themselves as such, and considered all Egyptians to be *one* people (Minority Rights Group International 1996:12; Makari 2007:51-52).

In the late 1920s Christian missionaries provoked the Muslim population, whose anger was turned against the Egyptian Copts. This was also the beginning of the Muslim Brotherhood. In the coming decade efforts made by the Evangelical movement to evangelize Orthodox and Catholic Copts resulted in conflict between the different Coptic minorities (Minority Rights Group International 1996:12-14). Despite interior strife, British colonial Egypt became the Copts' «golden age» in modern times. Between 1924 and 1950 the Copts had a higher degree of political representation than the corresponding number in society, and there has never since been a comparable Coptic representation (Minority Rights Group International 1996:23). This ended with the economic recession and sectarian strife in the mid-1930s. Once again the Coptic population suffered when the country faced times of distress. The majority party, the Wafd, was accused of Coptic fanaticism, and an increasing part of the Muslim population agreed with the Sharia principle that Muslims should not be ruled by Copts (Minority Rights Group International 1996:14).

3.3 Minority protection under Nasser, Sadat and Mubarak

Coptic minority initially welcomed Gamal Nasser and the 1952-revolution, but over time they grew suspicious as the military movement did not include Copts. Their position was influenced by ideological changes, and the Coptic elite were gradually removed due to agricultural reform. Nasser's reforms did not differentiate between Copts and Muslims, but tended to favour the latter. Important political parties to the Coptic population, like the Wafd party, was dissolved, which deprived the Copts of political positions and channels of self-expression. Concurrently many Copts emigrated. In the 70s and 80s these migrants took on political roles, demanding political rights for the Copts in Egypt. Once again intervention from the outside did more harm than good (Minority Rights Group International 1996:15f).

Anwar Sadat came to power after Nasser's death in 1970. Sadat's regime emphasized religious identity. His ten year presidency was dominated by economic,

political and social transformations, which deprived many Egyptians of a system of reference and identification, and many turned to religion instead (Nispen tot Sevenaer 1997:29). In 1971 Sadat introduced a Constitution which would remain in force until the Arab Spring (Minority Rights Group International 1996:17-18). The 1971 Constitution names Sharia as *a* source of legislation, but a constitutional amendment of 1980 made it the principle source. The amendment is commonly understood not to have a retroactive effect, but to guide future legislation. This implies that new laws should be in line with the prevailing principles of Sharia (Wahab 2006). Sadat's politics resulted in a polarization of Egypt's religious groups and an increase in sectarian strife. As a result Egypt faced a rise of both Christian and Islamist fundamentalist groups in the 1970s. The first direct confrontation with the Church took place when Sadat accused the Coptic pope of becoming a political leader, seeking to create a Coptic state. The dispute peaked in 1981 with armed conflict and eventually the assassination of the president by an Islamist fundamentalist (Minority Rights Group International 1996:18-19).

Sadat left behind a divided nation with basic economic, social and political instabilities and a divided people (Minority Rights Group International 1996:20). His successor Hosni Mubarak started his rule by declaring Egypt in a state of emergency (Brown 2000:1063). The Copts' chance of representation increased with new election laws, but at the same time the newly won sustenance of the Muslim Brotherhood and their request for Sharia made the Copts anxious (Minority Rights Group International 1996:20). To appease the Coptic population, Mubarak has amongst other traditionally appointed two Copts as ministers to his cabinet, and in 2002 he announced the Coptic Christmas as a national holiday (Brown 2000:1064, Makari 2007:70). Mubarak's first four years in office were relatively stable, before sectarian violence spiked in the late 80s and early 90s (Minority Rights Group International 1996:21).

In the late 1990s, the International Coptic Federation complained that the Egyptian Copts were experiencing the «worst hardships in their modern history», and

the government was accused of turning a blind eye. The complaints included both discriminatory laws as well as a failure by the government to protect the minority (Brown 2000:1049). In an analysis of Egypt's legal system, Yustina Saleh (2004:74) states that the Egyptian constitution at the time offered protection for minorities, but its subordination of Islamic Sharia provided an «escape clause» from the guaranteed rights. The minority rights would only be valid as long as they were consistent with public interests, and the legal rights of non-Muslims were also restricted (Saleh 2004:76-78). The huge body of Egyptian legislation and lack of judicial review made consistency hard, and interpretation of the laws were left to independent judges (Saleh 2004:80-82). In the last decade of the Mubarak regime there were a growing number of violent incidents, and Coptic diaspora groups accused the government of ignoring rising insecurity. The violent wave culminated in the death of 21 Copts attending a New Years service 2010 (Minority Rights Group International 2013).

3.4 Copts in the Arab Spring

Also other places in the Arab world experienced people abuses from resilient authoritarian regimes, and in mid-December 2010 a Tunisian self-immolation sparked larger protests against police corruption and discrimination. The intensity and density of the Arab Spring distinguished it from previous protests in the region (Korany and El-Mahdi 2012:7). The protests quickly spread to neighbouring countries, from Morocco in the east to Iraq in the west. The rebellion took on various forms, scaling from civil war and revolution to civil uprising, major and minor protests elsewhere, answered with regime brutality. The protesters rioted against the long-term authoritarian states and relative deprivation, and became generally a fight for democracy and increased human rights (Blight, Pulham, and Torpey 29.11.11).

The riots reached Egypt January 25th 2011. The demonstrators occupied the Tahrir Square which soon became a symbol of the fight for civil justice. Anthony F. Lang (2013:356), director of the Centre for Global Constitutionalism, argues that the

occupation of Tahrir triggered «a prolonged process by which the constituent powers of the protesters out on the street» slowly was turned into constitutional form. The protesters addressed a number of issues, ranging from unemployment, food price inflation, poverty, human rights violations, corruption, police brutality, lack of free election and freedom of speech (Blight, Pulham, and Torpey 29.11.11; Parks 25.05.11). The demonstrators in the square demonstrated an apparent unity against Mubarak and for bread, dignity and freedom (Lesch 2012:17). Christians and Muslims stood beside each other on the barricades, and during the protests no slogans with religious connotations were used (Sika 2012:63). Two weeks after the Egyptian demonstrations started, President Mubarak resigned; the military dissolved the parliament and suspended the constitution. Although the Egyptian people had demonstrated an apparent unity against Mubarak in the square, many groups experienced dissolution after his ouster. Only military and Islamist forces were well enough organized to keep their mobilization, and they have been the two most visible forces in the following Egyptian transition.

Despite obvious discrimination, the Mubarak administration had supporters among the Copts. Pope Shenouda III, head of the Coptic Church, was said to support the authoritarian regime because he feared democracy would bring the Muslim Brotherhood to power (Al Aswany 2011:98). This fear was shared by other Christians, who worried about the uncertainty that would follow a regime change. Christian leaders stressed the need to maintain order in the first week of the revolution, and the pope publicly expressed his support for Mubarak (Sanders 2011; Champions 2011).

3.5 Concluding remark

The review of the Copts history in Egypt illustrates that discrimination of minorities has been prevalent since the beginning. After periods of relative equality and peace, there would be periods of sectarian violence and restrictions on the Coptic community. The Copts have experienced discrimination under Roman, Ottoman and British as well

as Egyptian rule. The Coptic religion may have had their high days in the 4th century, when Christianity was the Religion of state. But in the same century, hundreds of thousands of Copts were also killed for their faith. Further Arab conquest and Ottoman rule meant that Copts were treated as second class citizens. Early 20th century, the Copts had the best political representation. But as they refused to see themselves as a minority, they have never succeeded in organizing politically.

Discrimination of Copts seems to have been particularly prevalent in times of economic and political distress (Minority Rights Group International 1996:7). Under the Arab Spring, Copts were also at the barricades demanding equality and human rights, but in the aftermath of the revolution many feared for the future. The country is currently at a cross road, and the fresh start given by the Arab Spring may yield an opportunity to secure constitutional equality for Copts. Simultaneously history shows that exactly transitional periods and national distress can be the toughest for the Coptic population, and Egypt runs the risk of falling into that same trap again. The question remains whether there has been an improvement since the Spring. In late 2013 and early 2014 there have been further attacks on the Coptic population, and minority rights remains as relevant as ever.

4 The Constitutional Declaration of 2011

The Constitutional Declaration of 2011 was the first attempt of translating the constituent power of the Arab Spring into constitutional form. February 11 2011 President Mubarak stepped down and Egypt's Supreme Council of the Armed Forces (SCAF), a group of senior army officers, came into power in a transitional body. Two days later they set the 1971 Constitution aside, and by the end of March, their preliminary Constitutional Declaration was in force. The Declaration has been criticized of being illegitimate as well as too similar to the old constitution.

International Studies Professor Tamir Moustafa (2012:1) argued after the 2011 process that Egypt's transition was «shaping up to be a case study in how not to initiate a constitution writing process». The content of the preliminary Declaration as well as the process towards it will be the main object of analysis in this chapter. The analysis relies on an English translation of the text retrieved from the Egyptian Government Services Portal (2011).

4.1 Minority protection in the Constitutional Declaration

The Constitutional Declaration of 2011 was the result of a revolution, but it did not create a conclusive break with the past. The text included about 80% of the mainstays of the old constitution, and did not bring about the expected change. The Declaration consisted of 63 articles addressing state performance, basic rights and freedoms, system of government and due process. It ended the constant state of emergency, guaranteed freer elections, and required the parliament to create a constituent assembly to draft a permanent constitution (El-Din 2011). Lang (2013:357) argued that the Declaration «failed to live up to the potential of the revolution», and activists insisted in harsh words that it betrayed «the spirit of the 25 January Revolution» (El-Din 2011).

The 1971 Constitution had named a number of rights, but lacked efficient measures to ensure their enforcement. This remained a key problem in the 2011

Declaration. Most political scientists agree that neither constitutional provisions nor declarations of rights alone can effectively guarantee for the rights of minority groups. Minority protection relies on institutions capable of enforcing these provisions, and a government and society determined to make the institutions work (Khel 1984:51). As the Declaration was in force too short to assess its implementation, the analysis will mainly rely on the content of the constitutional text and the process towards it. This is also valid for the two following constitutions, and the constitutional texts remain the principle source of information for this thesis. The texts themselves reveal much regarding the likely results for the minority groups as well as the intentions behind the text.

The 2011 Declaration guaranteed Egypt's religious minorities certain fundamental rights. Article 12 ensured the freedom to practice religious rites, and Article 7 for equality and against religious discrimination (Egyptian Government Services Portal 2011). However, these rights were not unconditional, and the Declaration suffered from contradictions, qualifying phrases and «clawback clauses», that purported to grant rights, but in the fact did the opposite. Such vague formulations do not have the credibility expected from a modern constitution (Al-Ali 2013). A common critique of the 1971 Constitution was that the provided rights were curbed by diffuse qualifying phrases such as «according to the law» and «as provided by the law». This problem remained in the 2011 Declaration. The 63 Articles entail the exact words «according to the law» no less than 14 times. This confused the meaning. Moustafa (2012:1) argues that guarantees of fundamental rights should detail the conditions of any limitation to ensure a clear meaning of the constitutional text. No matter how well intended, vague qualifications open for multiple understandings of the text, and may in the next round be used in a discriminatory way.

The second article of the Declaration reduced the value of the guarantees against religious discrimination, undermined the guarantee of equality as well as the right to practice religion for some religious groups. The English translation of the

article states that «Islam is the religion of the state, and the Arabic language is its official language. The principles of Islamic law are the chief source of legislation» (Egyptian Government Services Portal 2011:Article 2). The old constitution contained a similar article, addressed in Chapter 3.3. Article 30 and 42 also reflected a similar religious inclination as the President and other state officials had to «swear to God» before taking office (Egyptian Government Services Portal 2011). This is problematic for all non-believers. The determination of a state religion can be offensive to non-Muslims and more secular Muslims who prefer a greater separation of religion and state, and undermines equality. Many states have a state religion and international standards allow for such, but Mamdouh Nakhla (2012), president of the Al-Kalema Centre for Human Rights, stated that Article 2 sets a precedent for favouritism of Muslims.

The reliance upon the Islamic law, Sharia, is even more problematic, and Nakhla (2012) deemed the implementation of Sharia «state-sanctioned discrimination against non-Muslims». The concept of Sharia is vague, but its use is often correlated with discrimination of non-Muslims, and the Dhimmi system mentioned in Chapter 3.1 has been one of its structuring principles. The main problem of the reliance upon the principles of Sharia is that it allows for religious rules to govern members of other religions as well. The religious provisions have also caused discrimination in inter-religious cases: Nakhla (2012) refers to a situation where the second clause of the Declaration was used to deny a Christian mother the custody of her child, as her husband had converted to Islam and custody is given to the superior in Islam. Converts to Christianity have also been denied to change their religious affiliation in their ID to «Christian» (Nakhla 2012).

Although Egypt is a signatory to both UDHR, ICCPR and ICESCR, the 2011 Declaration makes no reference to International Human Rights treaties apart from a general provision that the SCAF should «sign international treaties and agreements» (Egyptian Government Services Portal 2011:Article 56). The provision did not specify

which treaties were to be signed, and what status they would have had in Egyptian legislation. The constitution also failed to mention a number of rights Egypt is obliged to through international treaties.

The Declaration included provisions regarding political organization and division of power. After decades of authoritarian leadership, the 2011 Declaration yielded an increase in judicial independence and political pluralism (Freedom House 2012). Article 4 stated the citizens' rights to form associations and unions, although limited to «according to law». Also a provision from the 1971 Constitution banning religious parties remained (State Information Service 1971:Article 5). The corresponding article in the 2011 Declaration states that «It is not permitted to directly engage in political activity or form political parties on the basis of religion, race or origin» (Egyptian Government Services Portal 2011:Article 4). The ban would have limited party plurality, but remained largely theoretical towards the elections and mainly affected more extreme Islamists and some previously banned parties were legalized (Freedom House 2014).

The military's *desire* for more power became apparent in the constitutional text. An electoral advantage was given to established political groups through the strict time frame put forth in the Declaration. This made it hard for new groups to organize politically in time for elections. Article 56 further restricted the possible impact of minority groups in parliament, as it stipulated that SCAF would be the only body to legislate and govern (Egyptian Government Services Portal 2011:Article 56). This severely limited the powers of parliament, and seemed to curtail any real representative government, as it only allowed for a new president to rule effectively (Lang 2013:357). Even if the Copts had won a relatively large number of seats in the parliament, their influence would have remained limited, as the military consolidated their power.

4.2 The constitution-making process

As the SCAF seized power in February 2011 they promised a quick transition to civilian rule. However, attempts to enhance military power and secure military autonomy made many question their commitment to this promise. Their lush for a more prominent role for themselves became evident in the constitutional process as well as later delays of elections and renewal of Emergency laws in September (Freedom House 2012).

Shortly after Mubarak's ouster, the SCAF appointed a group of eight legal experts to draft a series of amendments to the 1971 Constitution. The head of the group argued explicitly that the power of the SCAF was «revolutionary» rather than constitutional, suggesting that he saw his role as turning the constituent power into a new legitimate constitution (Lang 2013:357). The SCAF ignored requests to set up a «presidential council» and made no efforts to bring in various political forces to oversee the process (Brown & Stilt 2011). Except from one member of the Muslim Brotherhood, members of all political parties and organizations were denied participation. There was also one Christian representative in the committee. After ten days of secret meetings a series of nine amendments were proposed. The amendments addressed some of the grievances of the people, but the people did not get to voice their opinion in the process. Their only influence was in the mere approval of the amendments (Moustafa 2012:3f).

The reception of the amendments was diverse. Some Egyptians voted in favour as they feared for their rights if a completely new constitution were to be written. Others came to understand the referendum as a vote over the perseverance of the position of Islamic law. The Muslim Brotherhood supported the amendments because of this understanding. Another camp of Egyptians was in strong opposition, mainly due to the lack of legitimacy in the process. Yet others objected because the changes were too few, and they feared a return of an authoritarian regime. Also the fact that the swift time-line would not give non-Islamic groups the time needed to organize and

prepare for elections was used as an argument against it (Moustafa 2012:4). For the Copts who feared the influence of the Islamists, it was probably a relief that they did not have a strong influence on the first amendments. The amendments were put to a referendum and approved by 77% on March 19th, with a turnout of 41% (IFES 2011). Compared to western countries with a longer democratic tradition this may seem like a low turnout, but according to an Egyptian standard this was as expected. In comparison, the two last referendums in Egypt back in 2005 and 2007 gained respectively 54% and 27% (IFES 2014a). One might have hoped for a higher participation in the election after the revolution, but a perfect democracy and high turnouts does not come over night.

The US Ambassador to Egypt, Margaret Scobey, initially praised the referendum, and said it was «an important step towards realising the aspirations of the 25 January revolution» (BBC 2011). At the time the majority in Egypt believed that the 1971 Constitution would be amended and stay in force, but two weeks after the referendum, the SCAF surprisingly announced their own newly written Constitutional Declaration of 63 articles. The Declaration displaced the old constitution entirely. It included most of the amendments approved through the referendum, but they did not entirely match the phrasing. Only ten days after the referendum, the SCAF effectively changed the rules regarding Egypt's transition: The order of elections and the process towards a permanent constitution decided through the referendum was left ambiguous. This resulted in further criticism regarding the legitimacy of the process. In the place of a constitution capturing the ideals of the revolution, came a document more similar to the 1971 Constitution (Moustafa 2012:4).

4.3 Minority protection explained through Elster's framework

The Egyptian military was the creator of the 2011 Declaration. In Chapter 2 it was pointed out that a constitution is not self-created, but has external creators. According to Elster most constitution-making processes have two creators – the institution or

individual deciding to convene a constitutional committee as well as the institutional mechanism selecting the delegates (Elster 1995:373). Contrary to this the 2011 Declaration only had one creator, as the military both initiated the process and appointed the constitutional committee. The group of eight legal experts appointed by SCAF were the framers of the initial amendments. As the identity of the framers of the final 2011 Constitutional Declaration is unknown, the focus will be on the first committee. Although some alterations were made, the initial amendments played a vital role in the shaping of the Declaration.

Through Elster's framework we can identify some initial *constraints* on the constitution-making process. First, the framers were *constrained upstream* by their creator, the military, and expected to create amendments in accordance with their *interests*. Secondly, it was commonly known that the amendments would be subject to a popular vote, and the expected referendum created *downstream constraints* as the amendments relied on public acceptance (Elster 1995:373-375). The amendments had to fulfil some of the people's *desires* in order to be approved. Constitutional amendments in violation of the ideas behind the Arab Spring would probably not have passed. In this assessment of the people, the framers had to rely on their *beliefs* about the people's *desires* (Elster 1995:376). In order to ensure that the amendments definitely would be accepted, it is likely that the framers would grant the people slightly more rights than absolutely necessary. As long as they operated within these boarders created by the *constraints* from the public and the military, the framing committee could frame the amendments according to their own *desires*.

Despite all criticism and the low representation of both Islamists and Copts in the initial assembly of framers, the amendments deterred neither of them. Neither was likely to win through with their *interests* in the assembly unless also a majority desired the same. Fortunately the *downstream constraints* worked to their advantage. In the aftermath of the revolution, Egypt witnessed an upsurge in support for Islamists, and the assembly were required to include provisions in line with Islamist views. At the

same time, they also had to balance in the demands from Egypt's minorities, whom also gained attention in the aftermath of the revolution. The result was neither an Islamic nor a completely secular constitution. Islam prevailed as the state religion, while the Copts simultaneously was granted slightly more rights. However, although the initial amendments were affected by the *constraints*, the military to some extent refused the *downstream constraints* by changing the rules of the game. The final Declaration was never subject to a referendum, and although it was partially shaped by the initial amendments, it did not adhere to these completely. For instance, when it came to the electoral process and making of a final constitution, the Declaration departed slightly from the language of the initial amendments, and left some ambiguity about the order of events (Brown & Stilt 2011). A constraint not followed is not a constraint, but the refusal of constraints has its limit. If the military had made any ideological changes, it is not likely that it would have gone down quietly, and the initial *constraints* were still affecting the result.

The constitution-making process in 2011 was neither participatory nor transparent (Moustafa 2012:3). A national dialogue was only initiated after the completion of the amendments, left it unable to address constitutional issues (Brown & Stilt 2011). The completion of the Declaration was even more exclusionary than the process towards the initial amendments, and even the identity of the framers of the final Declaration remains unknown (Brown & Stilt 2011). Experts in constitutional design often underline the importance of an inclusive and transparent process. This is the best way to achieve influence by political actors as well as provide the public with a sense of ownership. Procedural legitimacy may be time consuming, but it generally produces a perception of higher legitimacy of the final product (Moustafa 2012:3). The process towards Egypt's first constitution after the Arab Spring did everything but follow these general «best practices». Elster (1995:388-390) argue that discussions behind closed doors allows the framers to change their minds, and can contribute to improved quality of the *transformative* process. However, the non-transparency in the making of the 2011 Declaration likely had more disadvantages than advantages.

Moustafa (2012:3) even describes Egypt's transitional process as a «case study in how not to initiate a constitution writing process», and argues that if Egypt ends up «with a stable constitutional order protecting basic rights, it will be in spite» of the transition run by the SCAF.

Many of Elster's key concepts are based on knowledge of the constitutional debate and the framers' *interests*. The closed deliberation makes it hard to access this, and the unknown identity of the framers in the final process makes it impossible to identify their *desires and beliefs*. As the process was initiated by the military, and the resulting constitution was presented as what Nathan Brown and Kirsten Stilt (2011) at the Carnegie Endowment terms a «sort of gift by a patriotic military leadership dedicated to protecting Egypt and the principles of the revolution», I see it as appropriate to assume that the framers' *desires* were close to those of the military.

In the process towards the 2011 Constitutional Declaration a fair amount of *institutional interest* can be identified. As noted in Chapter 4.1, the military wrote an important position for itself into the new constitution. Amongst other the military's efforts to hamper religious parties in the elections and undermine the power of the parliament reflected their *desire* to remain in power. According to Elster, this does not necessarily stem from a *personal interest* of power, but rather that from their point of view a strong military seemed the best way to ensure order and peace through the transition period (Elster 1995:381). Apart from a mere *interest* in a strong military, Brown and Stilt (2011) identified some principles and preferences shown by the SCAF in the process: their *desire* for a «rapid transition; quick return to civilian rule; a specific sequence of referendum, parliamentary elections and presidential elections; and finally a new constitution», as well as «maintaining order; rejecting any formal structures of consultation; and lifting some restrictions on organized political life».

Although the military knew what they *desired*, the 2011 process points towards a military that did not know how to achieve this, as they changed the process along the

way. The changes made from the initial amendments to the final declaration, as well as additional regulations issued before the parliamentary elections, emphasize this point (Brown & Stilt 2011). As noted in Chapter 2.3, before the *beliefs and desires* of the various actors come together and results in a constitution, *transformation* plays in to the *aggregation* process. *Transformation* takes place due to deliberation and discussion. Although the content of the closed discussions remains unknown, it seems that some sort of *transformation* took place. For some reason, the SCAF came to believe that another procedure would serve their *interests* more than what they previously thought, and decided to change the Declaration.

The observed *transformation* might not have occurred if the discussions had been conducted in public. According to Elster the *passion* that most often surface in a constitution-making process is vanity. Most people are afraid to lose face if they change their mind after they have adopted a view in public (Elster 1995:384). Here the closed process surrounding the making of the 2011 Constitutional Declaration gave an advantage, as the secrecy counteracted vanity, and allowed the framers to change their minds. In this way secrecy can help to improve constitutional debate and induce a more honest discussion. However, the proceedings may at the same time move from reasoned discussion to more threat-based bargaining (Elster 1995:388). Secrecy can also shift the gravity of the discussion from impartial discussion to *interest*-based bargaining as the framers has less reason to present their *desires* as promoting the public good when the public can not hear them (Elster 1995:388). Due to the lack of transparency it is not known if the discussions were conducted behind closed doors to improve the discussion or how it influenced the process. However, the process allowed for the military to change their *beliefs* and the constitutional text without losing face as no one knew the identity of the framers.

A constitution serves an important role in protecting minority groups from a majority subject to *permanent passions* and prejudice. A problem occurs when the framers holds the same prejudices and *passions* as the framed authority and society.

When a country's majority is the same as the majority of the framers, the constitution runs a risk of mainly looking after the *interests* of the majority. Elster (1995:383) has observed how the framing majority in earlier processes exploited their position in the constitution-making process to manifest their own supremacy instead of *constraining* the majority from suppressing the minority. The one Coptic member of Egypt's committee was similarly not enough to ensure the Copts' rights in the 2011 process. In order to overcome the standing *passions* of the majority, Elster (1995:383) suggests foreign supervision or a constitution written by a small enlightened minority. This is not likely to happen, but a higher representation of Copts in the framing committee could be viable. The rights established in the Declaration seems to have been granted in order to serve the military's own *interest*, and not on the grounds of intrinsic fairness. By pleasing various groups of the public, they ensured their own power and legitimacy. In this way the military managed to increase their support and maintain order in Egypt, which in turn increased their chances of remaining in power.

4.4 Concluding remarks

The 2011 Constitutional Declaration provides the starting point for this analysis. In the months after Mubarak's fall from power the country witnessed a rise in sectarian tensions, culminating in the Maspero incident in October: 28 were killed and 300 injured when security forces and armed civilians attacked protesting Copts (Freedom House 2012). Albeit not able to protect the Copts in the tense aftermath of the revolution, the 2011 Declaration provided a helping hand to a nervous Christian community. The Declaration was the result of a revolution, but it was not a revolutionary constitution. It provided fundamental minority protection, but was weak and relied too much on Egypt's old legislation: It guaranteed equality and freedom to practice religious rites, but made no reference to international human rights treaties. It increased Egypt's judicial independence and political pluralism, but Sharia remained the main source of legislation. For the Coptic community it was a relief that the Islamist parties did not take part in the process, and no new religious clauses were

introduced. Due to the non-transparency of the process little is known about the bargaining and compromises made. The process was guided by the military, and the constitution was substantially affected by their *desires* and *beliefs*. The strongest determinant for the final text was the *institutional interest* of the military. The military tried to circumvent the people's *downstream constraints* by refusing to abide the initial amendments. The need to gain legitimacy as well as serve the military's own *interests* resulted in an improvement of Egypt's constitutional minority rights. The improved constitutional minority protection indicated efforts to please national and international expectations. The Declaration was still accused of failing to live up to the revolution and preserve a situation close to the status quo.

5 The Egyptian Constitution of 2012

The 2011 Constitutional Declaration paved the way for parliamentary elections later in 2011, presidential elections in 2012, as well as a new permanent constitution. As the Muslim Brotherhood's Freedom and Justice Party (FJP) won the most in the parliamentary and presidential elections, they were the ones mainly in charge of the process towards Egypt's second constitution since the revolution. The result was a heavy emphasis on religion, followed by a massive amount of critique from secular forces and religious minorities against its «Islamist design». The Constitution of the Arab Republic of Egypt of 2012 was passed by a referendum in December 2012, gaining 64% support with a turnout of only 33% (IFES 2012). The official English full-text translation can be found at Egypt's State Information Service (2012).

5.1 Minority protection in the 2012 Constitution

Compared to the 2011 Constitutional Declaration, the 2012 Constitution was a rather long text, consisting of 236 articles and a preamble. The Constitution built upon but also altered the 1971 Constitution, and a number of clauses remained the same (Lang 2013:360). The articles were divided into five parts, concerning «The State and Society», «Rights and Freedoms», «Public Authorities», «Independent Bodies and Regulatory Agencies» as well as «Final and Transitional Provisions» (State Information Service 2012:2-3). Part II included particularly many articles relevant to minority protection.

Although the 2012 Constitution was Egypt's first Constitution resulting from a democratically elected parliament, it did not enter into force without protests. Secular forces and various minorities objected to what they saw as an Islamist constitution concerned with Egypt's religious identity and military budget, without much emphasis on freedoms and equality. As matters of religion and military spending are fluid concepts vulnerable to change, secularists argued that a constitution is not the right

arena for that debate. After all, a constitution is expected to be permanent. According to this line of reasoning, a constitution should rather address basic fundamental issues like executive, legislative and judicial powers, as well as guarantee democracy and fundamental rights to all citizens (Diab 2012). Although the majority of Egyptians take faith seriously, the country has been a «civil state», administered and led by civilian, as opposed to by the military or religious authorities. The Constitution backed by the Muslim Brotherhood had a strong religious resonance, but it did not turn Egypt into a religious state (Al-Ali 2012).

Although not a religious state, the 2012 Constitution increased the religious influence already partially seen in the 2011 Declaration. The Constitution still require the President, Prime Minister, cabinet ministers and members of the People's Assembly and Shura Council to swear to «Almighty God» in the oath of office (State Information Service 2012:24;36;42), and the article regarding the standing of Islam and Sharia discussed in Chapter 4.1 remained in the 2012 Constitution. As the article established Sharia as the main source of legislation, this implied that future legislation would have to be in accordance with Sharia law. This also influenced how other provisions were understood and implemented. In addition, the Constitution included an additional article elaborating on the principles of Sharia. The much debated Article 219 stated that

The principles of Islamic Sharia include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community (State Information Service 2012:57).

The implications of this article aggravated the constitutional discrimination against non-Muslims associated with Article 2. Critics warned that the article restricted the possibilities of a broad and inclusive interpretation of Sharia, and could have reduced the chances of a more comprehensive minority protection in Egypt. The specific mentioning of Sunni doctrines was seen as an attempt by conservative Islamist politicians to provide constitutional basis for a stricter legislation. If this held true, the

article could have been a back door to include more controversial aspects of Islamic penal code in future legislation (e.g. Carnegie 2013a; Sabry 2013). The article raised questions regarding the standing of other Muslim doctrines in Egyptian law, and could have disenfranchised Shi'a Muslims whose legal traditions differ from those of the Sunni. Contrary to this, defenders argued that the article would not have had any real impact, and that the phrase «the larger community» opened for more including interpretations (e.g. Swett 2013). Yet others saw no problem in the clarification since there has been a Sunni majority in Egypt for centuries and their doctrines have been used as the basis for legal rulings for decades (Carnegie 2013a). However, the fact that something has been the practise for long does not necessary mean it is in the best interest for the minority population. In defence of the article it could be argued that it was necessary with a clarification of what is actually understood with the notion of Sharia, but the resulting debate revealed that it did not clarify much.

The final word for what is to be understood by Sharia was in the 2012 Constitution left to the Al-Azhar University. Article 4 stated that the «Al-Azhar Senior Scholars are to be consulted in matters pertaining to Islamic law». Albeit Al-Azhar is the institution responsible for judicial review within Sharia and hold the expertise on the field, the article potentially gave religious scholars a role in reviewing government legislation (Swett 2013). Human Rights Watch (2012a) argued that this gave a legislative position to «an unelected, unaccountable body with no recourse to judicial review». Giving an unelected body the right to decide upon future legislation constitute a democratic problem in a modern understanding of democracy. This is particularly problematic in terms of representation, as Al-Azhar is an Islamic institution. In practice, this clause would grant a religious institution the right to judge over other religions.

The 2012 Constitution was the first Egyptian constitution to introduce an article granting «special rights» to non-Muslim minorities. Article 3 defines the principles of Christian and Jewish jurisprudences as the basis of legislation for personal status

issues, religious affairs and selection of spiritual leaders for citizens of these respective groups (State Information Service 2012:7). Critics argued that Article 3 was effectively creating a religious state. The rights of Article 3 were limited to Christian and Jews, and the trisection made between Muslims, divine religions and others resembles the old Dhimmi system. The division violated the basic rights of the affected citizens and could have complicated legal conditions for non-Abrahamic Egyptians (e.g. Amnesty International 2012; Swett 2013). Egyptian Baha'is have for instance long not been probably recognized by the law. With the 2012 Constitution they could still not legally marry, were denied to have their religion stated in their ID cards and faced problems with matters such as inheritance (Bureau of Democracy 2012). The legal plurality complicates matters further when it comes to inter-religious marriage, divorce and questions of custody. Administration of such special rights is also in conflict with the idea of equality between groups and may enhance alienation. Moustafa (2012:1) argues that a wording that guarantees special rights for different religious communities should be avoided as it tends to strengthen religious institutions at the expense of particularly women's rights.

Article 43 established freedom of belief as an inviolable right, but like article 3 the guarantee of «freedom to practice religious rights and to establish places of worship» was limited to the divine religions (State Information Service 2012:15). Implicitly this left other religious minorities deprived of legal protection of their freedom to worship (e.g. Amnesty International 2012; Carnegie 2013a; Tadros 2012). Amnesty International (2012) also questioned the protection of Shi'a Muslims, as they have faced discrimination of their right to worship in the past. Supporters of Article 43 argued that it granted more freedom than previous constitutions, and that particularly the Christian minority would benefit as their right to build churches was secured (Carnegie 2013a). Human Rights Watch pointed out that prior drafts gave a general right to practise religion, and the limitations in the 2012 Constitution was a step backwards. Compared to international standards the freedom of religion is severely limited, and the provision only guarantees protection of «rites» and places of worship

(Human Rights Watch 2012b). Amongst other the Article did not include the right to change religion or raise children according to citizens' own religious beliefs (Swett 2013). The precise implications of the article were further diffused with the four words «as regulated by law», which opened for a number of legal restrictions (State Information Service 2012:15). Senior advisor on constitution-building for International IDEA, Zaid Al-Ali, argued that «the difficulty with this provision is not that it leads Egypt down a dark path, but that its effect is at this stage almost impossible to predict» (Al-Ali 2012).

Ambiguities and limitations were probably the main problem of the 2012 Constitution. According to modern democratic practice a constitution is supposed to be accessible by any member of the public, but this was not the case with the 2012 Constitution. The contradictions and limitations spread around the text made it hard for Egyptians to understand their own rights, and certain parts of the 2012 Constitution was according to Al-Ali (2012) even hardly understood by «constitutional scholars who have little else to do with their time». Like the 2011 Declaration, the 2012 Constitution was also full of vague limitations «within the context of the law». Al-Ali (2012) states that this made it hard to access the meaning of the Constitution without reviewing «the entire text and decipher opaque provisions».

The 2012 Constitution promised both «safety, security and equal opportunities for all citizens without discrimination» as well as «Equality before the law and equal opportunities for all citizens» (State Information Service 2012:5;9). As seen in the religious articles pertaining to freedom of religion this is not the case, and a number of other articles counteract genuine equality. The right to public meetings, processions and peaceful demonstration guaranteed was in the same way limited «based on the notification regulated by law» (State Information Service 2012:17). Supporters of the Constitution argued that such articles were not intentionally written to contradict the initial rights, but intentions alone do not reduce the constitutional discrimination (e.g. Sadiki 2012).

For Egypt's religious minorities to express their religious beliefs freely, it is important with freedom of thought and opinion. This was provided in Article 45 of the 2012 Constitution, but was restricted by other articles (Al-Ali 2012). Article 44 prohibited «insult or abuse of all religious messengers and prophets», and Article 31 prohibited «insulting or showing contempt toward any human being». Freedom of expression was in other words limited to opinions that neither religion nor individuals could find insulting. The vagueness of what is considered an insult or abuse of prophets opened for further deprivation of freedoms (Carnegie 2013a). Amnesty International (2012) points out that similar provisions have been used to restrict the freedom of speech before, and charges was brought against a number of individuals for «defaming religion» under President Morsi. Defenders of the article argue that it is not too controversial, and it falls within the boundaries of Sharia law (Carnegie 2013a).

The 2012 Constitution mentioned international treaties in Article 145. Like the 2011 Declaration it stated that international treaties should be signed (Human Rights Watch 2012b). Additionally the 2012 Constitution said that the treaties would have the force of law, but it did not explicitly give international law and treaties supremacy over Egyptian legislation (Amnesty International 2012). Eventually, the article concluded with «No treaty contrary to the provisions of the Constitution shall be approved» (State Information Service 2012:39). Effectively this meant that Egypt would not have signed any treaty counter to the 2012 Constitution, and removed the hope of improvement of legislation through international treaties. Amnesty International (2012) raised concerns regarding the lack of references to Egypt's obligations under international law. A United Nations Working Group claimed that the Constitution did not live up to the international instruments on Protection of rights and Freedom of expression (Human Rights Watch 2012b). The Human Rights Watch urged the Assembly to include human rights provisions as defined in international treaties signed by Egypt. This would have strengthened the basis for amending many restricting domestic laws (Human Rights Watch 2012b).

Egypt's religious minorities expressed concerns throughout 2012 that the increased Islamist political power would make religious minorities vulnerable to abuse. Some provisions of the 2012 Constitution opened indeed for such abuse, amongst other granted Article 212 the government extensive powers to control endowments and thus church finances. This in terms limited the Church's freedom when it comes to social services and operations (Tozman 2014). But all over, the 2012 Constitution actually bore signs of improvement in Egypt's minority protection (Freedom House 2013). In addition to granting the Copts special rights in article 3, articles 123-125 provided a strong mechanism to minorities in parliament by giving individual members the right to request information or demand a statement from the government or even to interrogate the prime minister in relation to urgent matters of public importance (Al-Ali 2012). It also contained welcomed provisions that limited executive power, and reduced the impact of the SCAF. The ban of religious parties was revoked, and the creation of several new parties across the political spectrum represented a departure from Egypt's authoritarian days (Freedom House 2013).

5.2 The constitution-making process

The process towards the 2012 Constitution met problems early on. As noted in Chapter 4.2, the 2011 Declaration was vague regarding the sequence of parliamentary elections and creation of a constituent assembly, and controversies emerged (Brown & Stilt 2011; Lang 2013:358). Those in favour of first creating a parliament, argued that only a representative parliament would be capable of creating a legitimate constitution, whereas the opponents held that a new parliament needed something to govern by (Lang 2013:358). The non-Islamist group emphasized that a constitution should be created without the imprint of the current parliament, as the parliament reflects the temporary political situation in Egypt, and the constitution is expected to be permanent (Diab 2012). In the end, parliamentary election took place first.

The military introduced initially a number of measures to hamper the parliamentary elections for the Islamist parties. The Muslim Brotherhood avoided the constitutional ban of religious parties mentioned in Chapter 4.1 by claiming Islam as a mere «reference point» rather than seeking to impose Sharia law (Reuters 2011). In October the SCAF amended election rules by banning the use of religious slogans in the elections. This directly affected the web pages of the Muslim Brotherhood and their slogan «Islam is the solution» (Ryan 2011). Contrary to these restrictions, the elections resulted in a parliament where almost 70% of the new chamber was held by previously illegal Islamist parties (Freedom House 2014). The Islamist coalition came to dominate the 2012 Constitutional Process. The Democratic Alliance led by FJP together with the more extreme political party Al-Nour won an almost three quarter majority in the lower house of parliament (Freedom House 2014). This Islamic influence resulted in a constitution reflecting religious *passions* and *interests*. It is important to keep in mind that this was not a simple Islamic majority, but rather a complex coalition of a broad range of different Islamic groups, that governed through compromise and debate (Lang 2013:359).

The lack of details regarding the make-up of the Constituent Assembly resulted in heightened discussions and stuttered the 2012 process early on (Al-Ali 2013).

Article 60 of the 2011 Declaration reads:

The members of the first People's Assembly and Shura Council (except the appointed members) will meet in a joint session following an invitation from the Supreme Council of the Armed Forces within 6 months of their election to elect a provisional assembly composed of 100 members which will prepare a new draft constitution for the country to be completed within 6 months of the formation of this assembly. The draft constitution will be presented within 15 days of its preparation to the people who will vote in a referendum on the matter. The constitution will take effect from the date on which the people approve the referendum (Egyptian Government Services Portal 2011: Article 60).

The Article did not specify whether the parliament could be a part of the constitutional assembly. In March 2012 the Islamic coalition decided to interpret Article 60 as to

include members of parliament, yielding a Constitutional Committee where two thirds had an Islamist background (Diab 2012; Lang 2013:359). Egyptian lawyer and parliamentary Ziad Bahaa-Eldin (2012) said that it was originally agreed that 40% of the seats in the assembly would be reserved for Members of Parliament, but in the last minute this was increased to 50% without giving the minority parties the chance to voice their opinion. The move left little room for deliberation and reflection in the committee, as the Parliament held the majority. It also revealed a majority capable of overriding the minority without taking their concerns into consideration. As a response, a number of Egyptian Christians as well as representatives from Al-Azhar and the Wafd Party decided to boycott the committee as they deemed it unrepresentative (Lang 2013:359f).

Only 2% of the seats in the Committee were held by Christians and women. This reflected the distribution after the parliamentary elections, but creation of the assembly could have been an opportunity to correct the skewed representation and allow for a constitution to be drafted for all Egyptians. Instead the Parliament decided to «replicated itself» in what Bahaa-Eldin (2012) termed a «miniature assembly». From a Western point of view a constitution should be grounded in democracy, equality and human rights for all citizens, and limit rather than increase the possibility of a majority to exercise power over the minority (Diab 2012). Protesters argued that the parliament had been elected with a mandate to fill a legislative and supervisory role and elect a Constituent Assembly and not to constitute half of the seats in the assembly itself (Bahaa-Eldin 2012). The Committee was challenged in court, deemed illegal and dissolved by the SCC, and the process had to start over again.

In June 2012 the parliament announced the names of the 100 members of the new Constitutional Assembly. This did not happen before SCAF threatened to create an assembly of their own if the parliament was unable to create one. The second assembly was more diverse than the first, but the Islamists still held the majority (Lang 2013:359f). The internal rules in the Assembly stipulated a majoritarian procedure

which left the minority groups little impact (Al-Ali 2013). A number of high-profile actors immediately rejected the committee, leading to continued disputes about its legitimacy. In the middle of the process, presidential elections brought Mohammed Morsi of the Muslim Brotherhood to power (Lang 2013:359f). Although imperfect and criticized for disqualification of presidential candidates, restrictions on electoral observers and procedural irregularities, the presidential election was according to Freedom House (2013) close to international standards, and Egypt's first genuinely competitive presidential contest.

The time frame of six months proved to be hard to keep. In order to push the stagnating process forward, Morsi issued a presidential decree in November that declared all presidential laws and decrees to be binding until the new constitution was finalized. This effectively crippled any attempt to bring the second committee to court. The bold move infuriated both the opposition and the international community, but may well have been what forced the commission to complete its work a week later (Lang 2013:359f). Although Morsi defended it as necessary in order to protect the drafting process and adopt a new constitution in a chaotic political environment, the move was widely characterized as a power grab (Freedom House 2013). At the time all non-Islamist had withdrawn from the committee, due to unfair negotiating tactics and a dismantling of trust between the parties. The decision to finalize the draft contrary to this is described by Al-Ali (2013) as a fatal blow to the credibility of the Constitution and the majority parties.

Egypt lacks a tradition of inclusive and protracted constitutional processes to draw upon, and also the process towards the 2012 Constitution took place behind closed doors. Foreign assistance might have counteracted the strong Islamist influence on the Constitutional text, and improved the text's legitimacy, but Egypt's foreign ministry rejected any assistance they were offered (Lang 2013:361). The 2012 process still yielded more insight than the 2011 process. Early in the process towards Egypt's second constitution since the revolution, Nathan Brown and Clark Lombardi (2012)

warned that any attempt to create an elected constitutional committee would make procedural and tactical agreement demanding and time consuming due to the wide variety of views in the opposition. The process did indeed drag out. Through the spring and summer of 2011, the Egyptian news was dominated by the problems of forming a constitutional assembly. This protracted process was nevertheless probably to prefer over an exclusion of a wider constituency in the process, as we already have noted the problems associated with this in Chapter 4.3.

The concerns regarding the illegitimacy of the constitution was reflected in the poor support at the referendum. As noted in Chapter 4.2, Egyptian elections usually gain low turn-outs, but out of the three constitutions discussed in this thesis, the 33% turn-out for the 2012 Constitution was the lowest (IFES 2014a). It also had the lowest support, and was passed with a 64% majority. This implies that no more than 21% of Egypt's edible voters voted in favour of the 2012 Constitution (IFES 2012). Few Copts voted in favour of the Constitution, and Freedom House (2013) holds that the referendum reflected a sectarian divide, and failed to quell mistrust and tension. In the six months it remained in force, the Constitution and authorities faced protests. Samuels (2006:4) argues that a constitution perceived as unrepresentative can aggravate political tensions, and this seems to have been the case with Egypt's 2012 Constitution. Many Egyptians did not feel that their views had been taken into account in the making of the constitution, and the grievances resulted in protests which culminated in the coup in July.

5.3 The 2012 constitution seen through Elster's framework

Compared to 2011, the 2012 constitutional debate was more dominated by religious *passions* than military *interests*, and the *desires and beliefs* held by the Islamist coalition gave the Constitution a more religious inclination. In contrast with the previous constitution, the 2012 Constitution had two external creators. The military has been the main force behind the 2011 Declaration, and as it was this Declaration

that demanded that a Constitutional Committee should be aligned, the military served as the first creator of the 2012 Constitution (Egyptian Government Services Portal 2011: Article 60). The second creator was the Islamist-led parliament that appointed the members of the Constitutional Assembly, and it was this creator that came to dominate the process most visibly.

Some initial *constraints* can be identified through Elster's framework. First, the military placed *constraints* on the 2012 process through Article 60 of the 2011 Declaration. As discussed in Chapter 5.2, it yielded formal requirements regarding time frame and sequence of events. The framework imposed by SCAF in March 2011 was not a result of negotiations or a common understanding between various political forces, but highly a result of their *institutional interests*. When the newly elected parliament approached the deadline for forming a constituent assembly without having been able to do so, the SCAF even threatened to take on this role. Secondly, the parliament induced *upstream constraints* on the process by interpreting the SCAF's requirements in a way securing a large part of the seats in the Constitutional Assembly for themselves (Al-Ali 2012). The parliament issued further constraining rules to guide the deliberations simultaneously with the announcement of the committee (Lang 2013:359f). However, when Morsi had the chance in June 2012, he did not remove the *constraints* posed by SCAF (Al-Ali 2012). The presidential decree in November finally ensured the Islamist influence on the process. Thirdly, also this Constitution was subject to a referendum, which placed *downstream constraints* on the process. The committee hence had to take their *beliefs* about the *interests* of the people into consideration, and likely constrained the framers from introducing more extreme elements of Sharia law into the Constitution.

The 2012 proceedings were closed, but still more transparent than the 2011 process. The framers' identities were known, and although not representative it included actors from more segments of society than the previous process. However, the procedural legitimacy was low, and resulted in more extensive protests than what

was seen in 2011. The closed proceedings resulted in a discussion dynamic similar to the one discussed in Chapter 4.3. Whereas the military had portrayed themselves as the saviours of Egypt with their slogan «the army and the people are one hand», the Islamist-dominated parliament lacked the identification of the people, and represented only a segment of the population. The 2012 constitution-making process enhanced fears of stricter rules and discrimination felt by the Coptic minority and secular forces. This deprived the people of ownership, and the increased transparency simultaneously resulted in visibility of any procedural mistakes. Additionally, the people were likely less lenient as this process should result in a permanent, and not a temporary constitution. Ironically enough, the «permanent» constitution of 2012 would in the end last shorter than the preliminary constitution of 2011.

In contrast with the process in 2011, the identity of the framers was this time known, which makes it easier to access their *desires* and *beliefs*. Many of the framers were the same as the second creator, which made it possible for the *interests* of this creator to gain the most influence. In the constitution-making process *group interests* are strong determinants in the machinery of government (Elster 1995:382). This is visible in the procedural provisions. The proceedings relied on majority vote, which was decided by the parliament, whom also tried to secure the majority of the seats in the assembly for themselves. As a result, Coptic members felt their interests were not represented in the process, and decided to leave the Assembly (Freedom House 2013).

As with the 2011 process, *reason*, as understood by Elster (1995:377), played only a minor part in the 2012 process, and little room was left for thoughtful deliberations. Al-Ali (2013) states that the process was exemplary in its lack of vision. With no common understanding of which direction the country should be heading or what the new state should look like, the result became a constitution engraved with conservative legal traditions. As noted in Chapter 3, the best hope for the Coptic community would be a Constitution grounded in reason, but the ongoing Egyptian power game leaves little room for *reason* in the constitution-making process.

Passion emerged as the most prominent force in the 2012 process. Cass Sunstein (in Elster 1995:383) wrote that constitutional provisions should counteract «precisely those aspects of a country's culture and tradition that are likely to produce the most harm through that country's ordinary political processes.» These aspects are what is included in Elster's concept of *permanent passions*. In the case of Egypt, the Coptic minority fears the possible harm of Egypt's Islamic tradition, and a Constitution limiting the impact of religious rules would benefit the Coptic population. Elster (1995:383) argues that *passions* are avoided when the conditions of the framers are sufficiently different from those framed. As some of the framers in the Constitutional Committee of 2012 were the very parliamentarians whom the Constitution should frame, Egypt's Constitution of 2012 fails to limit the *permanent passions* and prejudices. This resulted in a Constitution that included more religious provisions rather than limiting the potential threat Sharia poses towards Egypt's religious minorities.

The Constitution reduced the SCAF's impact through a limitation of executive powers, but military *institutional interests* still influenced the 2012 process. The potential reduction of the powers of the military and judiciary threatened Egypt's established power structures (Samuels 2006:5). They reduced this threat by complicating the Islamist's ability to govern effectively, and simultaneously secured their own *interests*. The Muslim Brotherhood initially planned to support an independent candidate and promised not to run for president, as they already dominated the parliament and constitutional assembly. This would have yielded an impression that they sought to dominate Egyptian politics and could have triggered a strong anti-Islamist front. It therefore came surprising when the MB later announced their own candidate. Whereas some argued that this had been the plan all along, it was more likely a result of opportunity and perceived threats. On one hand they could not find an individual candidate serving their *interests*, at the same time as SCAF's mismanagement of the political process and fear of army crack downs on Islamists

forced them into the presidential race (Lynch 2012). Political analysts have described it as a trap set up by the military, where the MB rushed to assume responsibility and swallowed the bait (Bilici 2013; Black 2012).

The presidency turned out to be a strategic blunder that placed the brotherhood in a no-win situation, with more power than they could handle. Simultaneously Egypt's institutional machinery remained dominated by representatives of Egypt's established power structures, which undermined the Constitution and prevented its enforcement. The dismantling of the first Constituent Assembly mentioned earlier in the chapter can be seen as a part of this power struggle between the competing interests of the political establishment and the judiciary. Throughout 2012 further incidents of judicial intervention found place: During the presidential elections the SCC disqualified three presidential candidates, and in mid-June they dissolved the newly elected People's Assembly due to alleged legal flaws in the election, leaving Egypt's parliament without a lower house (Freedom House 2013). The combination of too much power and a malfunctioning system, made it increasingly hard to govern Egypt for the Islamists. Marc Lynch (2012) warned prior to the elections that an electoral victory would leave the MB «alone in the face of the military, and [they] would bear full responsibility for whatever happened in Egypt's economy, politics and society in the coming period.» The warning proved correct, and the Islamists ended up with the blame for malfunctions, depending as they were on a system that just waited for their failure so the military once again could seize power.

The 2012 Constitution bore signs of compromises along the way. In the case of article 219 those with the smallest stake in the outcome won the most. The Salafists and secularists took strong positions on each front, insisting on their own ideals. The result was a political compromise rather than an intellectually reasoned decision (Brown & Lombardi 2012). The Salafists desired a removal of the word «principles» from article 2, and preferred a more genuine adaptation of Sharia. The secularists opted for a generalist reading of the article, and did not accept the removal of the word

«principles» as it included general humanist principles such as freedom, justice and equality (Sabry 2013). As a compromise the Salafists decided to ensure that the interpretation of Sharia at least were left to scholars they could trust. The result was the inclusion of Al-Azhar in article 4 and the elaboration on Sharia in Article 219. As long as the secularists were assured that the modernist approach of the Supreme Constitutional Court (SCC) would survive, they went along with the new phrasing (Brown & Lombardi 2012). As the more extreme religious and secular actors agreed upon a version preferred by the Muslim Brotherhood, the latter remained the apparent winners without putting too much effort into the debate as they had less to lose.

As the proceedings were closed, little is known about the debate, but it is likely that some form of *vote trading* took place on the topic of minority rights. The Islamist coalition dominated the committee, but had to give some way in order to secure a majority vote. This resulted in a small victory to the Coptic community. Although dominated by religious passions, the Constitution still offers a slight improvement of the constitutional protection of minorities. Granting the Coptic minority certain rights put the Islamists in a position where they could secure the majority while being less lenient with women's rights. As a result Egypt's religious minorities gained relatively much compared to women in the 2012 Constitution. The inclusion can also be explained as a result of *misrepresentation*. Although increased minority rights was not one of the *desires* of the Islamist government, the inclusion was a mean used to get acceptance for their Constitution, and the gained legitimacy could open for the inclusion of more controversial aspects of Sharia in future legislation. However, these concessions were just enough for the Constitution to pass, but they were not enough for it to last.

5.4 Concluding remarks

This chapter has focused on the 2012 Constitution of the Arab Republic of Egypt. Like the 2011 Declaration, the 2012 Constitution did not provide a conclusive break with

the past. Both Constitutions include a number of provisions from the 1971 Constitution: Islam is amongst other still the religion of the state, and Sharia the main source of legislation. Additionally, the 2012 Constitution elaborated on the concept of Sharia. After the Arab Spring, one of the main fears of the Coptic community was an enhanced Islamist influence on Egyptian legislation. Although the 2012 Constitution has an increased emphasis of religion, the minority rights situation has also increased slightly, and compared to other minorities, the Copts can be considered one of the winners in the 2012 Constitution. 2012 was the only year after the Arab Spring for which the independent watchdog Freedom House rated Egypt as «Partly Free» and not «Not Free». The change is mainly due to an improvement of civil rights. The rating is based on the perceived freedom of expression and belief, association and organizational rights, rule of law as well as personal autonomy and individual rights (Freedom House 2012; 2013; 2014).

Although the military was one of the creators of the 2012 Constitution, the Islamist-dominated parliament gained the most influence on the constitutional text. The main force behind the changes in the 2012 Constitution was religious *passion*, and although improving Egypt's minority protection, this was largely a result of an Islamist *desire* to constitutionalise their power and beliefs, and gain legitimacy for the Constitution. Egypt's secular side feared that more controversial parts of Islamic law would be included in the future and open for further abuse of religious minorities, but the main problem of the Constitution remains its ambiguities.

6 The Egyptian Constitution of 2014

Egypt's first president elected by popular vote did not last long. Almost to the date one year after Mursi took office, Egyptians once again rallied against its leaders, accusing them of being undemocratic, and demanding the president's resignation. July 3rd 2013, Mursi was set aside and the Egyptian Constitution of 2012 suspended by the Egyptian army. The military appointed Adli Mansour, chairman in the Supreme Constitutional Court, as interim president, and the process towards yet another constitution began (Freedom House 2014). The military-led process resulted in a removal of the religious emphasis seen in the second constitution, and was welcomed by many Copts (El Deeb & Thabet 2014). Head of the constituent assembly claimed that the 2014 Constitution reflects Egypt's current situation and challenges, with a primary focus on freedoms, rights and the benefits for all parts of society (Al Jazeera 2014). The Constitution of the Arab Republic of Egypt of 2014 was approved by the Egyptian Assembly in December 2013 and by a people's referendum in January 2014, with a support of 98% and a turnout of 38% (IFES 2014b). An unofficial English translation of the Constitution is provided by International Institute for Democracy and Electoral Assistance (International IDEA 2013).

6.1 Minority protection in the 2014 Constitution

Compared to the terminated 2012 Constitution, the 2014 Constitution was increased by 11 articles. Besides the mere length, the two constitutions resemble each other in content as both build upon the framework provided by the 1971 Constitution. Out of the 247 articles in the 2014 Constitution there are 40 new articles. The remaining articles originate from the 2012 Constitution, and even much of the wording is intact: Approximately half of the adopted articles have not been changed, and the other half are somewhat amended (Lavi 2014). The articles are divided into six chapters, addressing «The State», «Basic Components of Society», «Public Rights, Freedoms

and Duties», «Rule of Law», «The Ruling System» and «General and Transitional Provisions» (International IDEA 2013:2-8). Particularly the third chapter address minority protection.

Although the outline is the same as the 2012 Constitution, journalists state that the new Constitution has a more civil and rationalist tone, attempting to be more enlightened and tolerant while anchoring human rights and freedoms (Lavi 2014). After a constitution reflecting the religious convictions of the Muslim Brotherhood in 2012, the 2014 Constitution has opted for the removal of many of the religious provisions. Markus Tozman (2014) at the World Watch Monitor terms the Constitution a nationalist project to bring together Muslims and Christians. Albeit the Constitution gives the Coptic minority the best protection in the history of the Arab Republic of Egypt, it is arguably not the Constitution most Egyptians dreamed of at the Tahrir square (Martin 2013). Whereas certain parts bear promise of improved minority rights, other sections point in the opposite direction, and like the previous two constitutions, the 2014 Constitution is contradictory and vague. Even more alarming is perhaps the constitutional strengthening of the power of the institutions supporting Mursi's removal – the police, military and judiciary (Lavi 2014). Those who believed the military coup in July 2013 would result in a coherent new constitution ready to counteract the authoritarian practices engraved in Egyptian political life are likely to be disappointed.

The removal of articles favoured by Islamists marks the most positive change for the Coptic minority (Carnegie 2013b). Although Article 2 regarding the status of Sharia remains as before, the controversial Article 219 has been removed. This opens for a more inclusive interpretation of Sharia than what was expected to be the result of the 2012 Constitution. Also the legislative role of Al-Azhar has been removed from the 2014 Constitution. The interpretation of Sharia is with this once again left to the courts, and its impact on Egyptian legislation remains the same as before the 2012 Constitution. The removal of these two religiously inspired clauses yields an

apparently less discriminating Constitution concerning the religious minorities (Carnegie 2013b; Rizk & El Shamoubi 2013). The previously debated Article 3, concerning Christian and Jewish personal affairs, remains close to the 2012 Constitution (International IDEA 2013:12). The «special rights» protect some rights of the Coptic and Jewish communities, but still increase the segregation from the Muslim majority, as well as towards other religious minorities. This differentiation in rights is also the case with Freedom of Belief, which is guaranteed in Article 64 for the «revealed» religions alone (International IDEA 2013:25). The corresponding Article 43 of the 2012 Constitution limited this freedom to the «divine» religions, and the modification does not mark a significant change (State Information Service 2012:15). The establishment of freedom of religion as «absolute» rather than «an inviolable right» in the same article is a more important change. If implemented, this would improve the protection of all of Egypt's religious minorities (Carnegie 2013b; Rizk & El Shamoubi 2013).

Another sensitive and enduring issue for the Coptic community is church building and renovation. Both the 2012 and 2014 Constitution guarantee for the freedom to practice religious rites and establish places of worship, but the 2014 Constitution is the first Egyptian Constitution to specifically address this issue of Church building (Tozman 2014). Article 235 demands the parliament to issue a law regarding «building and renovating churches, guaranteeing Christians the freedom to practice their religious rituals» (International IDEA 2013:67). However, Chapter 3.2 elaborated on problems previously faced by the Copts due to the Hamayouni decree. The decree was also initially intended to guarantee this right, but in the end it worked counter to its initial intention (Minority Rights Group International 1996:11f).

In contrast to previous constitutions, the new Constitution further acknowledges the cultural and historical status of Christians in Egypt, as «Egypt is the cradle of religions and the banner of glory of the revealed religions» (International IDEA 2013:9). The common Muslim and Christian religious heritage is highlighted, and

article 50 mentions the Coptic cultural heritage in particular (International IDEA 2013:22). In the preamble it is also referred to previous oppression of the Coptic minority, as it states that «On its land, Egyptians welcomed Virgin Mary and her baby and offered up thousands of martyrs in defense of the Church of Jesus» (International IDEA 2013:9). As noted in the introduction of this thesis, minorities in the Middle East were long not even recognized due to the idea of pan-Arabism and the territorial state (Ben-Dor and Bengio 1999:vii). The presence of Egypt's religious minorities has been inadequate in previous constitutions, and the positive acknowledgement of a common heritage and Coptic sacrifices in the new Constitution makes an important break with this constitutional tradition.

In accordance with the acknowledgement of the Coptic presence in Egypt, the minority is granted greater political representation through article 244 and 180. The former guarantees «appropriate representation» in the first House of Representatives for Christians and some other minority groups (International IDEA 2013:69). The latter does the same on the level of the local councils (International IDEA 2013:53). These efforts depict a willingness of the constitution-makers to acknowledge the Coptic presence, and improve their opportunities to exercise their own religious rites and take part in the Egyptian society (Rizk & El Shamoubi 2013). Although the Constitution provides certain provisions with regards to minority protection, other sections remain unchanged and without reference to the rights of the non-Muslim minorities. Christians have been promised a spot in the legislative assemblies, but this is not the case with Egypt's courts, and therefore their discrimination against Christians may prevail. There is nothing in the Constitution indicating that the rights of the non-Muslim minorities will be mirrored in educational curricula; the judicial sector remains mostly unreformed; and no new positions are provided in the civil service where the Copts have struggled to get jobs (Tozman 2014).

Many articles of the 2014 Constitution come with limitations, but some of the previously restricting articles have been removed. Egyptian's Freedom of Expression

has for instance been improved with the removal of Article 31 and 44 regarding the prohibition of insult of persons and religious messengers (Carnegie 2013b). However, scholars note that the 2014 Constitution includes vague limitations authorizing punishment for «inciting violence» and «dishonoring individuals», and Zaid Al-Ali argues that it is not better in terms of fundamental rights than the previous constitutions (Kirkpatrick 2014). The 2014 Constitution also removes Article 212 regarding the regulation of endowments. The Constitution acknowledges that Egyptian authorities likely will continue to be dominated by Muslims, and moves more of the power over church finances to the Christians themselves (Tozman 2014). Some new prohibitions also benefit the Coptic community: Amongst other the Constitution now criminalizes torture, discrimination on the ground of religion and arbitrary forced displacement (International IDEA 2013:23;25). Torture and displacement are not in itself discriminatory, but Christians have often been the victim of such actions, particularly in times of sectarian strife (Rizk & El Shamoubi 2013). The government has previously turned a blind eye towards displacement of Copts in rural areas, and the criminalization is a step towards less human rights violations towards the Coptic minority (Tozman 2014).

The standing of international treaties has also been somewhat improved in the constitutional text. Article 93 states that Egypt must abide to their obligations under international human rights treaties (Rizk & El Shamoubi 2013). This increased the commitment to treaties signed by Egypt, but a version of article 145 from the 2012 Constitution remains: Article 151 states that «no treaty may be concluded which is contrary to the provisions of the Constitution» (International IDEA 2013:46). As with the previous constitution, this implies that no new treaties that could improve Egypt's human rights beyond what is stated in the Constitution will be signed. However, as with the Constitution's acknowledgement of the Christian minority, the mere recognition of the treaties and Egypt's obligations to abide to them is an important step forward for Egypt's human rights situation. Over all, the Egyptian newspaper Ahram Online states that the 2014 Constitution provides more rights and freedoms; both to

minorities, women and media (Rizk & El Shamoubi 2013).

On paper, Egypt's Christians enjoy more rights with the 2014 Constitution than in any previous Constitution, but this does not necessarily mean that it will change their daily life. Prior to the referendum an official of the Egyptian Foreign Service said that «Egyptians do not respect simple traffic rules; How could they respect constitutional articles? No one read the constitution» (Tozman 2014). Non-implementation of Constitutions has made Egypt's Copts victim to structural, bureaucratic and judicial discrimination since the founding of the Arab Republic. This is not likely to change much. In order for the Constitution to change engraved discriminatory behaviour, it is necessary that the judiciary branch obey the constitutional provisions. However, there are no new mechanisms in the 2014 Constitution to ensure compliance and hold individuals and institutions accountable for constitutional breaches. Without the right mechanisms there are no guarantees that the new rights will be followed, and the rights of Egypt's Christians remain theoretical. Although it may very well be the best constitution Egypt has had, Tozman (2014) describes it as disappointing.

The shift toward political pluralism in 2012 was reversed in 2013 (Freedom House 2014). Where the 2012 constitution merely banned parties formed on discriminatory basis, the 2014 Constitution reintroduced a ban on religious parties in Article 74 (International IDEA 2013:27). Although present in the 2011 Declaration, the ban has been enforced stricter in 2014, and the FJP is currently deemed illegal. The ban might also discriminate other religious groups from organizing politically, including the Copts. A ban on religious parties may seem like an efficient way to relieve the Coptic community from their fear of an Islamic state and evade Islamists from taking charge. However, it is probably not the answer to the long standing tensions between Muslims and Christians, and previous experiences suggest that suppression of Egypt's Islamists would more likely increase conflict (Freedom House 2014).

The ban of Islamist parties is only one of the steps taken to ensure the power of the state apparatus, and many worries for the increased power of the military, judiciary and police in the Constitution. Patrick Martin (2013) at The Globe and Mail argues that this move may affect both Egypt's prospects of democracy and the Copt's hope for genuine equality. According to the Constitution, the military and judiciary deserves the privilege of having independent budgets. The military budget is to be settled by the defence minister, president and prime minister, and included in the national budget without parliamentary debate (International IDEA 2013:54-59). The election of a defence minister is also left to the military leadership for at least two presidential terms (International IDEA 2013:67). Civilian control of the military, a hallmark of many democracies, is further limited by declaring that the defence minister must always be a member of the military (Martin 2013). The president is also granted the power to dissolve the parliament (International IDEA 2013:43). Before any new laws affecting the police can be introduced, the police must be consulted (International IDEA 2013:60). This effectively blocks any attempts of reform, and is a step further away from democratic ideals and closer to the old autocratic regime (Al Jazeera 2014). A number of clauses in the Constitution make changes virtually impossible, whereas the 2012 Constitution at least left room for Constitutional change through two-thirds majority (State Information Service 2012:57).

The fact that there are no mechanisms to enforce the Constitution and that Egypt will not sign any international treaties contradicting the Constitution makes the constitutional strengthening of institutional power even more worrisome. If arguing that a vote for the Constitution was a vote for more human rights, it was at the same time a vote against other democratic rights. Mohamed Fawaz of the 6 April opposition movement argued: «We can never participate and give legitimacy to a regime which fools the people and tries to act like it is a civil democratic regime, while it is neither democratic nor civil» (Al Jazeera 2014).

6.2 The constitution-making process

Egypt's transitional process had so far been troubled, and the July coup left Egypt deeply polarized. Third time's the charm, and with the process towards Egypt's third constitution in three years came yet another chance to resolve some of Egypt's problems. However, the chances were that it would prove hard to overcome the conservative mentality reflected in the two first constitutions and offer some real progress for the country (Al-Ali 2013). Shortly after the military coup, the military appointed Adli Mansour as interim president. The interim government claimed to be civilian, but in July Mansour cited the head of the armed forces as the source of his authority (Freedom House 2014). Mansour set forth a time schedule, and issued a constitutional declaration regarding the transition. Also this document was drafted by anonymous figures, and was immediately objected to due to various shortcomings. The declaration granted Mansour almost unlimited executive and legislative powers. Both Morsi and SCAF had caused much controversy when they tried to secure similar rights for themselves. Although political constraints would limit the powers, the declaration clearly opened for an abuse of power by the president (Al-Ali 2013; AP 2013).

Mansour's declaration stipulated that a ten-person committee should draft the initial constitutional amendments. Although Egypt's judges are famous for their conservative way of thinking and questionable work methods, Mansour decided that six of the committee members should be judges, and the committee became heavily influenced by the judicial branch (Al-Ali 2013). Once their work was completed, Mansour appointed a Constitutional Assembly to finalize a constitution built upon the initial draft. The 50 person committee was supposed to represent all components of the Egyptian society. However, Mansour's declaration did not provide guide lines for the distribution and election of delegates. The declaration also failed to mention whether decisions were to be reached through majority vote or consensus (Al-Ali 2013; Brown 2013; Saleh 2013).

A further problem was the time frame. In Chapter 5.2 it was pointed out that the

2012 Committee barely had enough time for deliberations, and this time it was cut in half. The expert committee had one month to complete their work before the Constituent Assembly were granted two months to finalize the draft. Then a referendum would be organized within yet another month. Al-Ali (2013) argued that the drafters did not «need more time to come up with precise formulations of the ideas» on the table; the problem was rather «that there is still yet no consensus on what those ideas are, or even where the table is». The limited time frame left no room to engage in a deliberate debate regarding which direction Egypt should take, and the result was yet another constitution unable to create a serious break with the past (Al-Ali 2013).

The initial amendments drafted by the «Gang of 10» were criticised for the near autonomous status the army secured for itself. For the religious minorities and secular parties one of the most disappointing moves was the stipulation that parliamentary elections would take place between individual candidates rather than party lists. This would favour rich actors and local notables who had supported the authoritarian government. The head of the Egyptian Social Democratic Party (ESDP) argued that neither youths, women nor Christians would get elected with this system, and promised that both the ESDP and the MB would oppose this at the referendum stage (Saleh 2013). Like previous constitutions, the amendments failed to emphasise Egypt's international human rights obligations and to secure the right to build houses of worship for the Copts. The two latter objections were mended in the final draft. All over, the amendments pointed towards a downscaling of the religious provisions, but it also allowed for the re-emergence of figures previously close to Mubarak (Kholaiif 2013). As seen in Chapter 6.1 these two trends became apparent also in the final constitution.

Once the initial amendments were completed, the «Gang of 50» started their work. Like in 2012, an appearance of representativeness was attempted by including members from various bodies and parts of society, but the resulting committee was

neither demographically nor politically representative. The representation was skewed to the opposing end of the spectrum of the 2012 committee, with only one Islamist member. The Islamist actors were hence not likely to have much influence on the process although they gained almost two thirds in the prior elections. Compared with the 2012 committee, the Copts gained more representatives, but alongside with other non-Muslim religious minorities they were still under-represented (Brown 2013; Freedom House 2014).

The Constitutional Assembly was expected to build the Constitution upon the initial amendments. However, they decided to ignore this request, and wrote a constitution based on the previous constitution. The content of the final draft resembles some of the initial amendments, but altered some of the more criticized parts. The refusal to build the Constitution upon the amendments limited the influence of the legal experts, and the final Constitution was completed by people with less experience in law (Brown 2013). The final text reflects the diverging voices within the Committee and the fragmented process leading towards it, and Nathan J. Brown (2013) described the process towards the Constitution as more like a «Christmas tree on which everyone hangs his or her favorite ornament than a comprehensively-designed sculpture».

The final draft was completed in December 2013, and a referendum held in mid-January. Although the Constitution used the 2012 Constitution as a starting point and a number of initial problems were transferred, many Christians welcomed the Constitution due to the removal of the religious provisions (Al Jazeera 2014). Their enthusiasm was not shared by all Egyptians, and a vote in favour of the Constitution was by many seen as an acceptance of the July coup (Tozman 2014). Due to perceived illegitimacy of the coup, but also because of the removal of the religious phrasings, the Muslim Brotherhood encouraged voters to boycott the vote. As tensions were running high, Al Jazeera (2014) said the voting «could be a defining process for the country or something that could further tear it apart». The referendum was the first test of public opinion since the election of Morsi as president, but the news channel questioned the

credibility of a referendum boycotted by segments of the population. The turn-out in the referendum was only slightly higher than in 2012, but with a 98% support (IFES 2014b).

The Constitution was expected to pass by a wide margin. An outvote of the Constitution would likely result in chaos, and for a population desperate for some stability, law and order, acceptance was the only viable option (Al Jazeera 2014; Tozman 2014; Martin 2013). Although their draft was expected to pass, the military lashed out against its critics in the weeks before the referendum. International media reported about posters in favour of the Constitution all over Cairo, whereas the no-campaign was refused public attention. Attempts were made to silence journalists who portrayed the election and constitution in a negative light. Travel bans were issued to opponents of the Constitution; a group of journalists from the Associated Press were briefly jailed; and three detained Al Jazeera journalists were charged of «broadcasting false news» that could «harm national security» (Kirkpatrick 2014). Already before the coup it was hard to obtain reliable information in Egypt, but as the authorities shut down three major Islamist television channels it became even harder (Freedom House 2014). Neither the 2014 Constitution nor the process towards it was perfect, but Egypt could also not go forward without a constitution.

6.3 The 2014 Constitution seen through Elster's framework

Similarly to the 2011 Constitution, the 2014 Constitution was initiated by the military, and they served as the creator of the Constitution according to Elster's framework. Contrary to the 2012 process there was no constitution to guide the new process and serve as a creator, as the previous constitution had been set aside. Interim president Mansour was the second creator as he appointed the Constitutional Assembly. As a chairman in the SCC, the *interests* of the judiciary were high on Mansour's agenda (Freedom House 2014). As the military appointed Mansour as a president, we can assume that they held a *belief* that he would serve the military's *interest* in the process.

His position would likewise be strengthened by a strong military, and he would be motivated to elect candidates serving the military's *interests*. Whether merely due to self-interest or ideological motivation, both creators had a shared *interest* of a committee framing the Constitution according to the *desires* of Egypt's old military and political elite (Martin 2013).

The process was not much more inclusive and participatory than the 2012 process, but in contrast to the preliminary 2011 constitution, the identity of the framers was known. Once the committee got to its work, the public had no insight in the discussions before the 60-day time frame was due. On more occasions the Committee conducted secret votes, and undermined in this way its transparency (Freedom House 2014). According to Samuels (2006:29), a representative negotiated process is a minimum in order to achieve a sustainable transition to democracy. This can also be argued in relation to minority protection. None of the three processes examined in this thesis has fulfilled this minimum requirement, and Egypt's transitional process suffers from lack of both inclusion and a negotiated vision of what Egypt should strive to be.

The committee was faced with *upstream constraints* by the creators regarding procedure and substance. However, the Constitutional Committee did not abide by them all. They refused amongst other to create a blueprint of the initial amendments, and wrote a new constitution from scratch instead. As Elster (1995:375) said: A constraint that can be ignored, is not a constraint. However, the Committee nonetheless adhered to some of the *constraints* created by the initial draft regarding the substance. The time frame was also an issue. The Committee was granted 60 days, but decided to stop the clock every Friday, which gave them a couple of extra weeks. Although this may be a minor issue, it was a clear protest against the procedural *constraint*, and Nathan Brown (2013) interpreted it to be the Committee's way to say they didn't take orders from no one.

The Constitutional Assembly was further bound by *downstream constraints*, as

the approval of the Constitution relied on the acceptance of both the Egyptian Assembly and the Egyptian people. If they had ignored the creators' *constraints* all together, the authorities would not have accepted the draft. However, as mentioned in Chapter 6.2, the Constitution was expected to be endorsed by a majority regardless of its flaws (Kholaf 2013). A constitution was necessary for Egypt's continued transitional path, and in some ways it seemed more crucial to complete *a* constitution regardless of its content than to actually achieve significant improvements. This reduced the impact of the *constraints* in the drafting process. For the Constitution to last it was however necessary to gain acceptance from the people, and the Constitution was to some extent guided by the framers' *beliefs* about the framed's *desires*.

Also this constitution is in keeping with Egypt's constitutional tradition, and apart from the removal of the religious clauses the content resembles the 2012 Constitution. Al-Ali (2013) suggested early in the process that a recalibration of objectives, *interests* and methods would be necessary to avoid further deterioration, and proposed careful deliberations to guide the process. According to him only an understanding of what went wrong in the previous constitution-making processes would ensure that the same mistakes were not repeated (Al-Ali 2013). Al-Ali makes with his arguments a plea for putting weight to *reason* in the constitution-making process. Elster (1995:384-386) states that *reason* can win over both *passion* and *interest*, but that this only rarely happens. The Egyptian constitutional committee and its creators lacked the moral high-ground needed to prioritize such impartial, disinterested motivations in the constitution-making process. Had Al-Ali's suggestions been taken into account, and a careful deliberation based in intrinsic fairness taken place, the Constitution might have yielded a credible plan to achieve a democratic future for Egypt. Instead the Constitution reflects the constitution-makers *desire* to protect narrow *interests* instead. The 2014 Constitution in this way reflects the persistence of Egypt's conservative past, and reproduces many of the problems faced in the two last constitutions.

Although not relying on *reason*, the 2014 Constitution moved away from the *passion* prominent in the 2012 Constitution, and removed the religious clauses that could have opened for oppression by a majority «subject to permanent passions and prejudice» (Elster 1995:383). The absence of Islamic voices in the Constitutional Assembly is directly reflected in the removal of amongst other the contested article 219 and 4. These religious provisions could have resulted in oppression of Egypt's religious minorities, and the removal enhanced the minority protection of the Constitution. Further measures identified by Elster (1995:383) to overcome such *passions* are a bill of rights and the reservation of parliamentary seats for minority groups. As discussed in Chapter 6.1, the former is improved though the enhanced emphasis on international treaties as well as the inclusion of slightly more minority rights in the Constitution. The latter is guaranteed through «appropriate» representation of Copts in both the first House of Representatives and local councils. Despite these efforts, neither measure is sufficient enough to completely overcome all the aspects of Egypt's culture and tradition that could cause harm to the religious minorities (Elster 1995:383).

Elster (1995:380-382) observed that *institutional interest* had the highest explanatory power for the making of post-1980 constitutions in Eastern Europe, and particularly for the machinery of government. I will argue that this is the case with Egypt's 2014 Constitution as well. The military secured an important role for themselves in the 2011 Declaration, and this tendency became even more evident in the 2014 Constitution. The provisions noted in Chapter 6.1 granting the military extensive rights over the military budget and appointment of the minister of defence were a direct result of *institutional interest*. The same *institutional interest* can explain the increased presidential powers, as it is commonly expected that general El-Sissi will be running for – and winning – the presidential elections in May. The judiciary has secured their role in the new Egypt through their central position in the removal of Morsi in July. Although the initial amendments drafted by judges and legal experts was dismissed, they still played a leading role in the further drafting process, with the

interim president looking after their *interests*, and the Constitution entrenched their power as well as the military's (Freedom House 2013).

As the military and judiciary dominated the writing process, they granted themselves extensive powers at the expense of parliament and democratization, and the constitutional debate degenerated into a «division of spoils» between the powerful players. A more inclusive and participatory process would likely have broadened the constitutional agenda and given room for *reasoned* discussion and inclusion of more fundamental issues (Samuels 2006:5). Samuels (2006:4) argues that a Constitutional Assembly that represents one dominant interest tends to be biased towards that *interest*, which in turns undermines aspects of democracy. She exemplifies with an example from Chile, where the military sought to increase their own power after the coup in 1980 while excluding the political left (Samuels 2006:24). The current situation in Egypt is similar, where the military has secured their own power. Through the ban on religious parties, they exclude the competing Islamists from the political scene (Samuels 2006:4). In the autumn, the Muslim Brotherhood was deemed a terrorist organization, and members arrested and prosecuted (Freedom House 2014). In contrast to this a more representative process would likely results in less democracy undermining provisions (Samuels 2006:4). Simultaneously many Islamists blamed the Copts for the outlawing of the MB as well as the coup, and have retaliated with violent attacks (Freedom House 2014). Although the Constitution has secured more rights for the Copts, it has also contributed to the increase in religious polarizing since Morsi's ouster.

Institutional interest also seems to have had important implications for the enhanced minority protection. The removal of the religious clauses was an *interest*-based choice rather than an example of *reason* and intrinsic fairness guiding the process. The framers of the 2014 Constitution did not have the same religious *passions* as the previous committee, nor did they demand a completely secular text. The enhancement of minority rights was used as a piece in the military's game for power:

By granting the minority population relatively more rights, they ensured their support. This move can also be understood as an aspect of *misrepresentation*: The military does not have a desire for enhanced minority protection in itself, but by saying so they increase their legitimacy and are able to enhance their own power instead. A similar move was made towards some Islamist segments of society by keeping Islam and pillars of Sharia clearly established in the Constitution's preamble. The removal of Article 219 simultaneously with the keeping of the «principles of Sharia» is in accordance with the Salafists' initial *desires*. Although boycotted by some Islamists, members of the Nour Party approved the draft on these grounds (Al-Ali 2013; Martin 2013).

By keeping basic religious provisions at the same time as establishing a more civil tone, the military attempted to create an image of the Constitution as a legitimate manifestation of the people's will. The preamble of the Constitution further underline this, as it emphasizes that the military has been a «pillar» of Egypt since the days of Mohamed Ali, and hails what it calls «our patriotic army» for bringing «victory to the sweeping popular will in the “Jan 25 – June 30” Revolution» (International IDEA 2013:9). The wording depicts the two uprisings in early 2011 and June 2013 as a continuous revolution, and idealizes the army as «the protector of the people's will» (Martin 2013; Tozman 2014). If the military lives up to what is promised in the Constitution, this may give the minority population more rights, but one may ask oneself at what cost. The constitutional improvement of minority protection grants the Constitution legitimacy, but at the same time empowers the position of the military, and the military has granted themselves privileges not entirely in keeping with a democratic ideal (Martin 2013).

6.4 Concluding remarks

When the Islamist-led government of 2012 enhanced the religious emphasis in the Constitution, they deepened Coptic fears of being treated as second class citizens. The Copts were harassed and denied casting their vote in the 2012 referendum. In January

2014 many Christians voted for the first time without being afraid, and with a feeling that their votes finally carried weight. The 2014 Constitution represents a swing of the pendulum away from the religious imprint of the 2012 Constitution. Whereas an Islamist dominated parliament and president were main forces behind the latter, the military was the creator of the 2011 Declaration and 2014 Constitution. Whereas the 2012 process was guided by *religious passions*, the two military constitutions were mainly formed by *institutional interest*, reflected in the increased power of Egypt's military, police and judiciary and removal of religious provisions.

The Coptic community benefited from this *institutional interest* in terms of constitutional minority protection, and was awarded for their support in the overthrow of Mursi. The new rights are not guided by intrinsic fairness and *reason*, but are rather used as a mean to improve the legitimacy of the Constitution and the military government in Egypt and abroad.. The widened protection of Egypt's Christians also granted the Constitution more benevolence from Western countries. The Constitution keeps the special rights introduced in the 2012 Constitution, removes elements of religious discrimination, and provides better representation and guarantees of church building. Albeit it is not a perfect constitution, it acknowledges the Copts to an extent not seen before in Egyptian legislation. The result is a constitution that encapsulates the most comprehensive minority protection so far seen in Egypt's constitutional transition, and the Copts were quick to embrace the 2014 Constitution.

While the Copts rejoice the advances made with the removal of power from the Islamists, the new Constitution at the same time takes two steps back when it comes to democracy. If implemented, the rights in the new Constitution exceed the expectations of the Coptic community. But constitutional promises are no guarantee for compliance with the constitutional provisions, and the Constitution does not entail any new mechanisms to ensure this. Chapter 3 addressed how the Christians fare worst when the country is in times of distress, and the current suppression of political Islam in Egypt may only exacerbate religious tensions. Christian support of the new

Constitution as well as their increased rights has put them in a situation where they are perceived as complicit with the military regime. This may result in further retaliations by Egypt's extreme Islamists. A democratic constitution, securing equal rights for all – without suppressing any fragment of the population – is likely to yield the best result for Egypt's Coptic minority.

7 Conclusion

This thesis has examined Egypt's recent constitutional processes in light of Elster's theoretical framework «Forces and Mechanisms in the Constitution-Making Process». It has analysed the evolution of Egypt's constitutional minority protection since the Arab Spring, and sought to understand these fluctuations by applying Elster's framework. The focus has been on the situation of the Coptic community, and the three constitutions written since March 2011 as well as journal articles, newspapers and human rights reports have been the main sources of this analysis. The thesis finds that there has been a slight improvement in Egypt's minority protection on paper. The analysis conclude that this upward trend is not a result of a constitution grounded in *reason* and intrinsic fairness, but rather mainly due to military *interests* in the 2011 and 2014 Constitution, and religious *passions* in the 2012 Constitution. Although the Copts' fears in 2011 have turned to optimism, their prospects under Egypt's new military regime are not likely to improve remarkably in the time to come.

7.1 Three constitutions and constitution-making processes

Egypt did not face an easy task when the country in 2011 set out to transform the constituent power of the revolution into a constitution, and had to overcome «the deeply conservative and narrow mentality of a whole generation of people who are working against genuine progress in the country» (Al-Ali 2013). Large parts of Egypt and the Western world rejoiced after the overthrow of Mubarak, and expected democracy and human rights to win over Egypt's authoritarian past. Simultaneously Egypt's Copts worried for the future, as they did not know what the change would bring about. The process since then has yielded surprises, both in constitutional content as well as in the mere number of Constitution written.

Egypt's transitional process over the last three years has been represented by a

swing of the pendulum from military power in the interim period, to democratic elections won by Islamists in 2012, and back to military might in the July 2013 coup. Each period contributed with a new constitution to Egypt's legal history. The constitutions are in keeping with Egypt's constitutional tradition, and have not made an absolute break with Egypt's past. With the old 1971 Constitution as a backdrop, the three constitutional texts reflect the contemporary political situation and power balance in Egypt, although also influenced by the aspirations of the revolution. The framework provided by the 1971 Constitution sets some initial constraints for the possible constitutional innovations. The constitutions share many similarities, and even a number of articles remain the same. Since before the Arab Spring, Islam has been Egypt's religion of the state and Sharia the main source of legislation. All three constitutions give a minimum of minority rights and guarantees amongst other equality and freedom of belief. The texts witness of a slight improvement in minority protection: The 2012 Constitution for the first time guaranteed special rights for Jews and Copts and demanded the president to sign international treaties, and the 2014 Constitution even guarantees for building of churches and political representation for the Copts. However, neither constitution is without discrimination, nor has the situation of other minorities than the divine religions improved significantly. Egypt has still a long way to go before their Constitution lives up to what they are obliged to through international treaties. The main problem with the constitutions is perhaps the vague and contradictory clauses that limit the guaranteed rights. This becomes particularly apparent in the 2012 Constitution, and it is hard to understand its actual implications. The analysis finds that the degree of minority protection does not seem to be directly dependent on the level of democracy, but rather a result of forces and mechanisms present under the constitution-making process.

The 2011 Declaration and 2014 Constitution were created by the military, and the process was mainly guided by *institutional interest*. This is reflected in the manifestation of power of military and other institutions in the constitutional text. The analysis finds that the improvement in minority protection seen in the 2014

Constitution is mainly a result of *institutional interest*. The main conflict in the constitution-making processes turned out to be not primarily between a secular and religious side, but rather between the competing elites. In this “game of voters”, the rights of non-Muslim minorities have become a piece to be played in order to achieve power and legitimacy of the constitution. The Islamist led parliament left the largest impact on the 2012 Constitution. Although the 2012 Constitution was the result of a more democratic process, it also gained the lowest legitimacy, reflected in the low turn-out in the referendum. The constrictions set forth by the parliament gave room for *passions* to influence the process. *Passions* are often associated with suppression of minorities, and the Copts feared it would manifest in possibilities of abuse of minorities. An ideal constitution should rather be grounded in *reason* than *passions* or *institutional interests*, as it would grant minority protection as an end in itself and ensure compliance and future improvements.

Egypt's long tradition of closed and non-transparent constitution-making processes influenced the transition since the Arab Spring, both in terms of a closed and non-inclusive process. The closed proceedings have given the public little insight and entrenched the room for a public debate. Elster argues that closed proceedings can give a better and more genuine debate. However, an inclusion of the broader public could have broadened the agenda, and resulted in a Constitution grounded in *reason* and the *desires* of a wider group of society. The secrecy also significantly reduces the available information about the actual debate.

In the first constitution the identity of the framers is unknown, but the process was military initiated and guided by military *desires*. However, it seems they were not sure how to meet their own *desires*, or came to realise that other means would serve their *interest* better. As a result a *transformation* took place between the initial amendments and the final Declaration, and also over the course from the 2011 to the 2014 process. The 2012 process was largely controlled by an Islamist coalition, but some vote-trading likely happened during the debate in order to ensure the majority.

This resulted in a better protection of the religious minorities than feared by the Coptic community, and simultaneously a decrease in women's rights. This could also be a result of the upstream constrictions set by the expected referendum. The power attained by the religious parties after the elections, seems to have been a trap set up by military *interests*. The power of the Islamists trembled when the state apparatus refused to cooperate and undermined the constitution, and became the end of the 2012 Constitution. The third constitution-making process was also led by the military, and highly influenced by the judiciary. Although the second committee decided to stand up towards the constraints of the Islamist dominated parliament, the final constitution still needed approval of both the people and the authorities, and was constrained by the framers *beliefs* about their *desires*.

Although the 2014 Constitution yielded the best constitutional protection of minorities seen in the history of the Arab Republic of Egypt so far, it is far from a perfect constitution, and the improved minority protection came with undermining of democracy and enhanced powers to the state apparatus. As none of the three constitutions has remained long in effect, we cannot know for sure how they would have or will affect the minorities before an implementation in the legislative branch apart from what is stated in the constitutional text. Such a counter-factual discussion remains also outside of the scope of this thesis.

7.2 Securing minority protection through democracy and reason

Although minority protection is one of the hallmarks of modern democracy, Egypt's transitional process shows that democracy and minority protection are not necessarily dependent on each other. Egypt's democratizing process peaked in 2012, but the constitutional minority rights did not improve as much as many expected it would with democracy. The Copts simultaneously feared for the implications of the religious provisions. In contrast, the military coup in 2013 and the following Constitution of 2014 was a step back for Egypt's democratization process, as the will of the people

was set aside and military power enhanced at the expense of the power of parliament. The constitutional rights of the Copts improved slightly with the ouster of Morsi, and the Copts themselves were relieved with the return of a military regime. With that said, the prospects of Egypt's minority protection did not reach its potential with this constitutional change either. This is mainly due to four facts:

First, lack of compliance with the constitution has previously been a problem in Egypt, and the new Constitution also lacks the mechanisms necessary to ensure enforcement. Whereas the Copts have been granted some rights, they do not have a place in the judiciary, and might be object to abuse by Egypt's conservative lawyers. The military reign is only likely to obey the constitutional provisions enough to ensure their own legitimacy in the future. Likewise, a perception of high legitimacy is also essential in order for the framed to follow the constitutional provisions.

Second, constitutional minority protection grounded in *reason* is likely to yield the best and most thorough protection of Egypt's minorities. However, Egypt's constitution-makers have given their own *interests* too much attention in order to overcome Egypt's engraved authoritarian mentality. Some measures have rightfully been taken in the 2014 Constitution to overcome *passion*. The religious provisions of the 2012 Constitution have been removed, and the Copts have been granted seats in parliament and local councils, but *institutional interests* still guide the last constitution.

Third, although not guiding the constitution process, *passion* is still present in the Egyptian society. Particularly religious *passions* are running high, and many Islamists are blaming the Copts for the overthrow of Morsi and the illegitimization of the MB and other Islamist organizations. History shows that social distress when tensions are running high usually reflect badly on the treatment of the Copts. The banning of Islamist parties and ousting of their president is also likely to result in retaliations against the Coptic community, as they are seen as complicit by some Islamists.

Forth, the prospects of further improvements of minority rights are weak if Egypt relapses into a new authoritarian regime. Although President Mubarak is gone, much of the old system remains, and many powerful people would prefer a recurrence of a more autocratic regime. To gain a minimum of legitimacy such a regime will have to make appeasements towards both Muslims and Christians. The chances of a revolution of Egypt's human rights remains low, as the current regime uses the rights as a mean to legitimize their own power, and not as an end in itself. A democracy gives a better chance of rights as an end in itself. As such, a stable democracy and equal rights for all citizens grounded in *reason* and a concept of intrinsic fairness remains the best hope for a prosperous minority protection in Egypt.

Three years after the Arab Spring, it is the Western world that worries for Egypt's future. The Copt's initial fears of Islamic domination and a constitution dominated by religious *passion* has been avoided so far, and at least on paper their rights have been improved over the course of the three constitutions. But the future prospects of the Coptic community would probably have been better with a more democratic rule, and the last chapter of Egypt's transition so far may in the end not gain the Coptic community. The trade off of democracy for minority rights seems like a bad bargain, and the constitutional improvement of minority protection may remain just that: constitutional, and not applied to real life.

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